

Admitted into evidence subject to objections

Midway & Arctic - C.A No 80 C 5363  
Judge Decker

Transcript of Proceedings

UNITED STATES INTERNATIONAL TRADE COMMISSION

**FILED**

NOV - 4 1981

In the Matter of:

CERTAIN COIN-OPERATED AUDIOVISUAL GAMES  
AND COMPONENTS THEREOF: NAMELY-RALLY-X  
AND PAC MAN

H. STUART CUNNINGHAM, CLERK  
UNITED STATES DISTRICT COURT

) Investigation Number  
) 337-TA-195  
)  
)

**DOCKETED**

NOV 5 1981

Pages: 487 through 663

Washington, D.C.

September 25, 1981

Transcripting Company

Official Reporters

1111 K St. N.W.

Washington, D.C.

20004

I N D E XWITNESSESDIRECTCROSSREDIRECTRECROSSVOIR  
DIRE

Craig E. Larson

492

522

560

562

---

Shih Minf Huang

564

---

---

---

---

Mary Beth  
Peters-Gingery

586

608

---

---

---

David Albee

624

660

668

671

---

Bernhard C. Dietz

673

679

---

---

---

---

680

681

---

EXHIBITSIDENTIFIEDIN EVIDENCE

Respondent's 20-23

---

501

CRX-1

538

539

RX-24

580

581

CRX-2

618

---

CRX-3

618

---

CRX-4

618

623

BEFORE THE

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:

Certain Coin-Operated Audiovisual Games  
and Components Thereof: Namely-Rally-X  
and Pac Man

)  
)  
)  
) Investigation No.  
) 337-TA-105  
)  
)

1010 Wisconsin Avenue  
Washington, D.C.

The above-entitled matter came on for hearing,  
pursuant to notice, at

BEFORE: HON JOHN J. MATHIAS,  
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

TOM SCHAUMBERG, ESQ  
CECILIA GONZALES, ESQ.  
PAUL PLAIA, ESQ.  
Plaia & Schaumberg  
1019 19th Street, NW  
Washington, D.C.. 20036

A SIDNEY KATZ, ESQ.  
DONALD C. WELSH, ESQ.  
Fitch, Even, Tabin, Flannery & Welsh  
135 South LaSalle  
Chicago, Illinois 60603

1  
2 On behalf of the Respondent:

3 RICHARD G. KINNEY, ESQ.  
4 Kinney & Niblack  
5 55 E. Jackson Blvd Suite 1645  
6 Chicago, Illinois 60604

7 On behalf of the International Trade Commission:

8 SAMUEL BAILEY, ESQ.  
9 701 E. Street, NW  
10 Washington, D.C.

11 On behalf of the Department of Justice

12 THOMAS J. BYRNES, ESQ.  
13 Civil Division  
14 U.S. Department of Justice  
15 Washington, D.C. 20530  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

JUDGE MATHIAS: Good morning, please come to order.

Mr. Bailey isn't here yet but possibly if there are any preliminary matters that need to be discussed, we could get those out of the way.

MR. PLAIA: Yes, Your Honor.

JUDGE MATHIAS: All right, Mr. Plaia.

MR. PLAIA: I wish to make an oral application for a subpoena to be issued for this afternoon, maybe starting at 2:30. I have asked my office to prepare one that I expect to be here momentarily for your signature for a Mr. Bernie Dietz. On the basis of our interview of Copyright Office personnel, we understand that Mr. Dietz was present at a critical meeting and that the -- his recollections are not consistent with those of a witness who Mr. Kinney will be presenting.

JUDGE MATHIAS: Is this to be a rebuttal witness?

MR. PLAIA: Yes, Your Honor.

JUDGE MATHIAS: I doubt if we are going to get to him at 2:30 this afternoon. But I will, and I would like you to make sure that he isn't sitting around here all day waiting, but I will sign the subpoena when it is presented to me.

MR. PLAIA: Thank you, Your Honor.

MR. KINNEY: Your Honor, I would like to, are we

on the record?

JUDGE MATHIAS: We are on the record.

MR. KINNEY: I would like to call Mr. Larson.

JUDGE MATHIAS: Excuse me?

MR. KINNEY: I would like to call Mr. Larson.

JUDGE MATHIAS: All right, I was trying to wait a moment or two until Mr. Bailey showed up. But I thought if there were any preliminary matters, we could get those out of the way while we were waiting.

MR. PLAIA: I might fill that with another preliminary matter and that is that I would like permission of the Court to release after midday today the test set up for -- so that we can take it to Chicago, Illinois. We think we can return it here by Wednesday.

Secondly, we have an Exhibit that we have used here, which is I believe is CPX-1, the Pac-Man Artic Board, video game board. That was produced pursuant to discovery in this case and also in the Chicago District Court case and the Chicago District Court will be beginning a preliminary injunction hearing on Monday morning. And we would like to be able to use the evidence there and then return it here.

MR. KINNEY: Are you done?

MR. PLAIA: I wanted to indicate that that would be the certified tapes also that we have here.

JUDGE MATHIAS: All right. I wanted to check

to see -- I am not all that familiar with ITC procedures.<sup>we</sup>  
I am informed that has been done in the past, so you may  
remove the equipment with the understanding that it will  
be returned.

MR. KINNEY: Your Honor.

JUDGE MATHIAS: Yes, Mr. Kinney?

MR. KINNEY: I have no objection to the removal  
of the equipment and returning it, but perhaps if they remove  
it at 12 noon, it will deny me the opportunity to ask my  
witnesses about it.

JUDGE MATHIAS: I thought, I didn't think that  
you were using the test equipment.

MR. KINNEY: Well, I do have a couple of questions  
about the test equipment I am going to ask my witnesses.

JUDGE MATHIAS: Mr. Plaia, would it be possible  
for you to remove it at a later time?

MR. PLAIA: Yes, but yesterday when he was listing  
his witnesses, he indicated that he would have Mr. Larson  
and Mr. Huang this morning and at 1:30 he was starting with  
the Copyright Office personnel. Would you be --

MR. KINNEY: You are absolutely right, but I said  
I intended to interrupt Mr. Huang's deposition -- or his  
testimony -- excuse me, so as to accommodate the Copyright  
Office personnel, their time schedules.

MR. PLAIA: Can we ask if you would try to work

1 with the equipment early in his testimony so that we --  
2 because we do have to pack it up and to take it to Chicago.

3 MR. KINNEY: It all depends on how many objections  
4 and time delays and other matters that come into this  
5 testimony. We will try.

6 JUDGE MATHIAS: All right, I am going to ask you  
7 to, do your best to try to accommodate Mr. Plaia and we will  
8 just see what happens from there on in.

9 All right, I am not going to wait any longer. You  
10 may call your first witness, Mr. Kinney.

11 MR. KINNEY: I would like to call Mr. Craig Larson.

12 JUDGE MATHIAS: Mr. Larson, will you please take  
13 the stand?  
14 Whereupon,

15 CRAIG E. LARSON

16 having been first duly sworn, was called as a witness  
17 herein and was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. KINNEY:

20 Q Mr. Larson, would you state your name, address  
21 and current employment?

22 A My name is Craig Larson. I live at 60 Hargrave  
23 Lane, Media, Pennsylvania; employed by Atlantic Richfield  
24 Company as an attorney.

25 Q Prior to joining Atlantic Richfield Company, who

Acme Reporting Company

1 did you work for?

2 A I worked for DePolly and O'Brian at Arlington,  
3 Virginia.

4 Q During the course of your work at DePolly and  
5 O'Brien, did you handle a series of copyright applications  
6 for registration for plans to copyright for Midway  
7 Manufacturing Company?

8 A Yes.

9 Q Approximately how many applications did you handle  
10 for Midway Manufacturing Company?

11 A Oh, probably 15, something in that order.

12 Q Did you ever attempt to register a claim for  
13 promotional material of Midway Manufacturing Company?

14 A Yes.

15 Q Mr. Larson, I have written on the sheet of paper  
16 up there a series of PA numbers, names and dates. And I  
17 was wondering, which I represent to you are the issued numbers  
18 of a series of five copyright registrations, and ask you  
19 if you recognize those?

20 A I do, but I believe the list is incorrect.

21 Q Well --

22 A I don't recall specifically PA registration numbers  
23 obviously. However, the first two items listed, Galaxian  
24 and Galaxian attract mode, I believe the Galaxian PA  
25 registration was effective as of March 6, 1980; the Galaxian

he

1 attract mode registration was effective as of May 23, 1980.

2 Q Thank you for that correction. Perhaps you could  
3 indicate some way that the dates are reversed. Well, that's  
4 alright, we now understand it.

5 MR. PLAIA: I believe that maybe we should correct  
6 it if you plan to introduce it.

7 JUDGE MATHIAS: Well, at the moment it hasn't been  
8 offered. It hasn't been marked as an exhibit. There is  
9 nothing in the record so far, except that Mr. Kinney has  
10 put something on a board and that he's got two dates wrong.  
11 We are making a poor record but that's Mr. Kinney's preroga-  
12 tive.

13 BY MR. KINNEY:

14 Q Were those the only PA applications, PA-type  
15 applications that you handled for Midway Manufacturing  
16 Corporation?

17 A Yes.

18 Q And those are, the first one was Galaxian, is that  
19 right?

20 A Yes.

21 Q Did you prepare these applications yourself?  
22

23 A I prepared all of the applications myself with  
24 the exception of Rally-X. However, with Rally-X before --  
25 I signed all the applications. Before signing the applica-  
tion for Rally-X, I made an inquiry of the person who

1 actually had the application typed up as to whether the  
2 information was correct or not. And formed an opinion that  
3 the information stated in that application was correct and  
4 signed my name to it.

5 Q In preparing the earlier applications, or the  
6 applications of this series, which -- what steps did you --  
7 how did you obtain the information that was put on those  
8 applications?

9 MR. PLAIA: Your Honor, I would object to the  
10 form, Your Honor, only could we take them one at a time so  
11 we can be certain about which he is speaking of?

12 MR. KINNEY: All right.

13 JUDGE MATHIAS: I would suggest first of all, Mr.  
14 Kinney, that at least you read into the record the list.  
15 We are talking about a series. We are talking about those  
16 applications. The record doesn't show anything at all.  
17 It might be helpful if you just read down through the list,  
18 making the correction on dates, then you won't need this  
19 exhibit and just leave that up there for the purpose of  
20 helping the witness.

21 MR. KINNEY: The first application is PA 59-977  
22 entitled "Galaxian" which is dated March 6, 1980. The  
23 second application is PA 68-323, entitled "Galaxian  
24 Attract Mode," and that is dated May 23, 1980. The third  
25 application is PA 83-768, entitled "Pac-Man" which is dated

November 13, 1980. The fourth application is PA -- or registration is PA 88-049, entitled "Rally-X" and is dated January 6, 1981. The last in the list is PA 94-274 entitled "Golf" which is dated January 19, 1981.

JUDGE MATHIAS: Isn't that "Gorf"?

MR. KINNEY: It's "frog" spelled backwards.

JUDGE MATHIAS: All right, now you had a question you were going to pose?

MR. KINNEY: Okay.

BY MR. KINNEY:

Q With respect to the first application, Galaxian, what was the source of the information that you put down on the application?

A The source of the information was written correspondence, telephone conversations that I had with Mr. Eric Cohen, from the firm of Fitch, Even & Tabin, in Chicago.

Q And Mr. Cohen is an attorney for Midway Manufacturing Company?

A Yes.

Q Did you have any independent information outside of the representations by Mr. Cohen that you have just discussed?

A Yes.

Q And what information was that?

A Primarily information that had to do with the

1 video tape itself which I had viewed and had photographs  
2 taken of prior to the time I filed the application for  
3 copyright registration for the Galaxian work..

4 Q What did the application for the Galaxian work  
5 consist of?

6 A Are you referring to the application papers that  
7 were deposited?

8 Q Yes.

9 A It was a transmittal letter accompanying the  
10 Galaxian registration. I believe was also an application  
11 to register a claim to copyright in a brochure entitled  
12 "Midway's Galaxian," I believe. I think the cover letter  
13 referred to both those registrations. The cover letter  
14 referred to our request for special handling, a request for  
15 special handling accompanied the application papers.

16 There was a completed and executed form PA, a completed  
17 and executed form PX, a video tape, a paper entitled  
18 "Synopsis of the Deposit," a short paragraph which incor-  
19 porated by reference Midway Galaxian brochure that a copyright  
20 registration and claims to that were separately being  
21 applied for concurrently. Three photographs were also  
22 left with the Copyright Office. At the time the application  
23 papers were filed those photographs, I believe, were of --  
24 were taken from the video type. I had a professional  
25 photographer under my supervision. They showed the score,

1 I believe score table game, the alien convoy configuration  
2 that appears on the video tape and the copyright notice that  
3 appears on the video tape.

4 Q The copyright notice that the photograph was taken  
5 of was a photograph of a copyright notice that appeared on  
6 the screen of the video game for which the video tape that  
7 was the subject of the tape?

8 A That was a close up of a copyright notice, wasn't  
9 it, that appeared on the --

10 Q The photograph was a close, of a panned down  
11 close up of the copyright notice that was physically affixed  
12 to the machine.

13 A That's correct.

14 Q And what was that copyright notice? Do you  
15 recall?

16 A Copyright Midway Manufacturing Company, that's  
17 MFG. CO. 1979, I believe to the best of my recollection.

18 Q Do you recall the examiner who handled, or the  
19 name of the examiner who handled the Galaxian application?

20 A David Albee.

21 Q Was he also the same with respect to the PA  
22 applications listed, was he also the same examiner who  
23 handled the Galaxian Attract Mode?

24 A Yes.

25 Q Was he also the same examiner who handled the

10  
1 Pac-Man PA application?

2 A Yes, I believe he was.

3 Q Was he also the examiner who handled the Rally-  
4 X application, if you can recall?

5 A I believe so. I could independently ascertain  
6 that. I believe that in at least one of these applications  
7 it's possible that Dave Albee was not the examiner who  
8 handled the application.

9 Regarding Gorf, I should say that -- I should add --  
10 that to clarify what was going on. In the first four  
11 registrations requests for special handling had been made.  
12 A request for special handling was not made in the Gorf  
13 application. I have absolutely no independent knowledge  
14 of who may have examined the Gorf application. The only  
15 reason that I have occasion to know who was responsible for  
16 the other four applications are the requests for special  
17 handling that were filed at the time the applications were  
18 made.

19 Q In the filings after Galaxian, the ones that you  
20 handled, did you specifically request that the applications  
21 be sent to the attention of Mr. David Albee?

22 A Did I specifically request --

23 Q Yes.

24 A -- that the applications be sent to the attention  
25 of David Albee? With Galaxian, I believe that I did, yes.

1 Q Mr. Larson, I am going to hand you what --  
2 documents produced, I believe, yesterday by Complainant in  
3 this case, or copies of them, and ask you if you recognize  
4 them?

5 MR. PLAIA: Can maybe we have them identified so  
6 I know what he is giving to the witness?

7 MR. KINNEY: We identified them as Respondent's  
8 Exhibits 20, and Respondent's Exhibit 21, which are appear  
9 to be or purport to be receipts for the Rally-X and the  
10 Pac-Man game from the Copyright Office, and a two-page  
11 exhibits, Respondent's Exhibit 22, which purports to be  
12 a letter from Mr. Larson to the Register of Copyrights  
13 regarding Rally-X, Respondent's Exhibit 23, which purports  
14 to be a rough letter to the Copyright Office regarding  
15 Pac-Man.

16 BY MR. KINNEY:

17 Q I ask, Mr. Larson, if you recognize those documents?

18 JUDGE MATHIAS: First of all, the documents may  
19 be --

20 MR. KINNEY: I'm sorry.

21 THE WITNESS: Yes, the Respondent's Exhibits, the  
22 paper marked Respondent's Exhibit 20 is a copy of a receipt  
23 that was filled out in my presence by an official in the  
24 Copyright Office, Public Information Office, at the time  
25 the Rally-X application was filed.

1 The Respondent's Exhibit 22 is a letter that I  
2 had prepared and signed that accompanied the application  
3 for copyright registration. Respondent's Exhibit 21 is,  
4 again, a receipt prepared in my presence by an officer in  
5 the Copyright Office, Public Information Office, at the time  
6 I filed the application papers for Pac-Man. And a brochure  
7 entitled "Pac-Man." The Respondent's Exhibit 23 is a  
8 cover letter that I prepared and signed and filed with the  
9 Pac-Man application.

10 MR. KINNEY: Your Honor, I move the admission of  
11 these into evidence.

12 JUDGE MATHIAS: Any objection?

13 MR. PLAIA: No objection, Your Honor.

14 MR. BAILEY: No objection, Your Honor.

15 JUDGE MATHIAS: There being no objection, they  
16 will be received.

17 (The documents referred to,  
18 having been previously marked  
19 for identification as Respon-  
20 dent's Exhibit Nos. 20 thru  
21 23, inclusive, were received  
22 in evidence.)

23 JUDGE MATHIAS: Mr. Kinney, do you have the  
24 requisite number of copies of these exhibits? There is  
25 supposed to be an original and two provided to me at the

1 time you offered them?

2 THE WITNESS: I would note that the copies that  
3 were provided to me that I have in front of me are unsigned  
4 copies of the letters. The cover letters, that is  
5 Respondent's Exhibits 22 and 23. To the best of my knowledge  
6 at the time I filed these papers, at least one of the copies  
7 had been signed by me. I submitted, in the case where I  
8 was filing applications for more than one work, or for more  
9 than one -- submitting more than one application, duplicate  
10 copies of the letter so that it could accompany each of the  
11 applications as they were being processed.

12 MR. KINNEY: Your Honor, these were received from  
13 Mr. Plaia yesterday. I haven't had a chance to make copies.

14 JUDGE MATHIAS: I would ask that you do so at the  
15 noon recess because our records are going to be fouled up  
16 if you don't follow the regulations.

17 MR. KINNEY: Thank you.

18 BY MR. KINNEY:

19 Q Mr. Larson, with respect to Respondent's Exhibit  
20 20, which is a receipt from the Copyright Office, I noticed  
21 that it appears to say "Attention: David Albee (PA)" on  
22 the top and I wonder if you have any recollection of how  
23 that came to have that marking?

24 A Yes. It is customary procedure in the Copyright  
25 Office when a request for special handling is made that

14  
1 an examiner from the group which the application will be  
2 assigned is called by the Public Information Office to  
3 review the application papers to see that they comply with  
4 the applicable regulations.

5 The examiners are called. There is also a person  
6 from the Assignments and Documents Section of the Copyright  
7 Office called when there is an assignment being filed in  
8 connection with the application who also reviews the  
9 assignment papers and it's compliance, again, with the  
10 Copyright rules.

11 This is done so that the -- before a decision is  
12 made on the request for special handling, it's routine and  
13 it is also routine that the examiner who is called down to  
14 examine these applications would be the one who would, in  
15 fact, subsequently examine them as they are processed through  
16 the Copyright Office.

17 Q Did you suggest that Mr. Albee be called as the  
18 examiner for this process you just described?

19 A In connection with either Rally-X or Pac-Man?  
20 Are you asking about Rally-X?

21 Q With respect to either one.

22 A To the best of my recollection, no, -I did not  
23 request that David Albee be specifically called.

24 Q During the course of the applications for these,  
25 these PA applications, while they were pending, did you

1 have occasion to interview, orally interview the examiner,  
2 Mr. Albee?

3 A These applications being?

4 Q Galaxian, Galaxian Attract Mode, Pac-Man or  
5 Rally-X?

6 A Yes. I should qualify that. I am not too sure  
7 what you mean by "interview." I had spoken with Mr.  
8 Albee, yes.

9 Q On how --

10 A I should take that back. You asked during the  
11 pendency of these applications?

12 Q Yes.

13 A Well, I think it's clear from the record that  
14 I did speak with David Albee at the time the application  
15 papers were filed, yes.

16 Q And how many interviews or conversations did you  
17 have with him?

18 A To the best of my recollection, the number of  
19 converstations that I had with Mr. Albee during the pendency  
20 of the applications, Galaxian, Pac-Man, Rally-X, were three.  
21 And those occasions were the time the application papers  
22 were deposited in the Copyright Office.

23 Q During those, any of those conver -- well, let's  
24 be specific. With respect to Galaxian, which was the first  
25 application, did you inform Mr. Albee that the video tapes

1 submitted was recorded after the date asserted as the date  
2 of first publication?

3 A You are speaking now at the time I deposited the  
4 application papers?

5 Q Well, at any time during -- well, you just said  
6 that's the only time you talked to him, correct?

7 A The question was during the pendency of the  
8 applications and that's what I responded to.

9 Q Well, let me ask the question again. With respect  
10 to the Galaxian PA application, PA 59-977 -- that resulted  
11 in Pa 59-977, prior to the approval of that application by  
12 Mr. Albee, did you inform him that the video tape submitted  
13 with that application was recorded after the date alleged  
14 in the application as the date of first publication?

15 A Yes.

16 Q When did you inform him of that and how?

17 A On February 26th. I had received a --

18 Q February 26, what year?

19 A 1980. It was on -- I believe that Tuesday is the  
20 day of the week. I don't have independent recollection of  
21 that. It comes from my diary, but I had received copies  
22 of the video tapes and a request from Mr. Huang that  
23 registration of the claims to copyright in connection with  
24 the video game, Galaxian, be pursued. We had a fair amount  
25 of difficulty trying to decide what the appropriate

1 classification and, hence, the appropriate application forms  
2 were for this work. Accordingly, I went over to the  
3 Public Information Office of the Copyright Office, spoke  
4 with the Public Information Officer, explaining what it was  
5 that I had and requesting advice as to the matters of the  
6 classification and the proper application forms to be used.

7         The Public Information Officer referred me to  
8 Mr. Albee. I went up to Mr. Albee's office and had a  
9 conversation with him. During the course of that conversa-  
10 tion the circumstances under which the video tape had been  
11 made were explained to Mr. Albee.

12         So he would have been aware that the video tape  
13 was made at about the time. I did not know and do not know  
14 now the exact date of when the video tape was made. However,  
15 it was stated to Mr. Albee that the video tape had been  
16 recently made and this information was clearly conveyed to  
17 him at that time.

18         Q     Was that after filing the PA application?     }

19         A     It was prior to the filing of the application.  
20 As I stated, we had considerable confusion in terms of  
21 deciding exactly how to go about registered the claims to  
22 copyright that had been made in this work.

23         Q     Did you show him the video tape that eventually  
24 was filed with --

25         A     I had the video tape with me at that meeting.

1 The Copyright Office had no video tape machines at that time;  
2 neither of us had actually seen the tape and there was no  
3 way for us to see it at that time, because the Copyright  
4 Office didn't have a machine.

5 Q When you filed the application later, did you tell  
6 Mr. Albee that this was the same video tape you had earlier  
7 and discussed with him?

8 A Well, I don't think I said in those words. But  
9 it was quite clear that -- you didn't ask the question but  
10 I will volunteer the information that because of the  
11 previous, this February 26 conversation with Mr. Albee, at  
12 the time I filed the Galaxian application at Mr. Albee's  
13 request during this previous meeting I specifically requested  
14 that Mr. Albee be called down to look at the application  
15 in connect with the request for special handling. And there  
16 was clear references back to our previous meeting.

17 I think there was absolutely no doubt that the  
18 application papers being deposited at that time were -- had  
19 to do with the same material we had discussed the previous  
20 week.

21 Q Did you discuss the previous week the date of  
22 first publication that you were eventually going into be  
23 used in PA 59-977?

24 A No, I don't believe so.

25 (Continued on next page.)

1 Q Was the videotape presented to Mr. Albee as a  
2 copy of the work?

3 A Could you be a little bit more specific as to  
4 what the question and what the time you are referring to  
5 is?

6 Q Okay. We are talking about the Galaxian and  
7 the time you filed the Galaxian, the application that became  
8 PA-59-977, which I believe was filed on March 6, 1980. Is  
9 that correct?

10 A I believe so. That seems like the right date,  
11 yes.

12 Q At that date and time, did you tell Mr. Albee  
13 that you were submitting a copy of the work?

14 A At that time, as I explained, the application  
15 papers were presented to Mr. Albee for his inspection in  
16 connection with a request for special handling. The appli-  
17 cation papers are reviewed by Mr. Albee. Whether he had  
18 any questions for me regarding whether this was a copy or  
19 not or specifically asked me whether the videotape was a  
20 copy of the work, no, I do not believe that he did ask  
21 me that question. And I don't believe that I made any  
22 statements concerning the question of what a copy of the  
23 work was or anything like that other than what was implicit,  
24 what was in the application papers as filed.

25 Q With respect to your cover letter for Pac-Man,

1 which is Respondent's Exhibit 23, I note on the first  
2 page it states, "The videotape deposit (one copy)." Is  
3 that correct?

4 A. Surely.

5 Q Did your cover letter to the Galaxian application  
6 have a similar statement?

7 A. It probably did, yes.

8 Q At that time, did you inform Mr. Albee that the  
9 videotape was not being submitted as a copy of the work?

10 A. The reason I am hesitating on that question is  
11 that I think that "copy of the work" has specific meaning  
12 in the copyright statute. The way I stated to Mr. Albee --  
13 as I said before, the application papers were filed, the  
14 application papers spoke for themselves. And as to whether  
15 Mr. Albee had any further questions of me during the  
16 inspection of those papers, I don't recall specifically any  
17 question of the type that you are referring to.

18 Q But you did not during that conversation inform  
19 Mr. Albee that this was not being submitted as a copy? You  
20 didn't volunteer that information and apparently he didn't  
21 ask it, is that correct?

22 A. That is correct. I make no representation as  
23 to the accuracy of the statement you made or its relevance.  
24 I am confused as to what the question is.

25 Q My question is, in your conversations with Mr. Albee

c3  
4  
1 regarding the Galaxian application that eventually resulted  
2 in PA-59-977, did you inform him that the videotape submitted  
3 was not being submitted as a copy of the work?

4 A. I think that in the context of my previous con-  
5 versations with Mr. Albee that we had discussed I suppose  
6 in an oblique fashion the question that you are referring  
7 to. The recency of that conversation and its obvious applica-  
8 bility to the application papers being filed I think was  
9 sort of in the air, if you will, at the time I deposited the  
10 application papers.

11 Q At the time you filed the application papers and  
12 had, with respect to Galaxian, PA-59-977, you had one conver-  
13 sation with Mr. Albee, is that correct?

14 A. Mr. Albee came down to review the application  
15 papers as the PA examiner responsible for examining those  
16 papers.

17 Q Was that the only conversation regarding this  
18 application that took place, to the best of your recollection?

19 A. With the exception of the February 26th conversa-  
20 tion I have referred to.

21 Q But February 26th there was no application.

22 A. That is correct.

23 Q You didn't have the forms prepared for Mr. Albee's  
24 review at that time, did you?

25 A. I had sketched out some application forms, yes.

1 As I said, we had -- there was considerable  
2 confusion on my part as to exactly how these claims to  
3 copyright were to be registered, and I sought advice from  
4 the Copyright Office on that matter. And in the course of  
5 seeking that advice I was referred to Mr. Albee and had  
6 a conversation with him.

7 Q Did you at the time of filing the application --  
8 was your answer was that there was only one conversation  
9 regarding PA-59-977 from the time it was applied to the time  
10 it issued?

11 A To the best of my recollection, yes.

12 Q Did you inform Mr. Albee that the game machine  
13 portrayed on the videotape of that application was not a  
14 machine as was first published in Japan?

15 A I have no knowledge of what you are speaking  
16 about.

17 Q Did you inform him that the videotape was recorded  
18 in the United States?

19 A That was conveyed to him in our February 26th  
20 meeting, yes. I stated that it was made by Midway Manu-  
21 facturing Company.

22 Q Did he indicate in your interview on March 6th  
23 that he understood or recalled your previous conversation,  
24 that this videotape and those conversations applied?

25 A Yes.

ac5 1 Q I believe your statement was it was made by  
2 Midway Manufacturing Company. Did you tell him it was made  
3 by Midway Manufacturing Company in the United States?

4 A At the February 26th meeting I had the videotape,  
5 and preparatory to asking his advice I explained the circum-  
6 stances under which the videotape had been made, what the  
7 videotape showed, and generally that what we were seeking  
8 protection in was the videogame, the copyright that we claimed  
9 in that videogame was according to what I had been told,  
10 that the client believed the copyright was being infringed.  
11 And subsequently in that conversation we discussed what, we  
12 sort of had general theoretical discussions of what protection  
13 could be obtained in his opinion and how to go about obtaining  
14 that protection. I would sort of caution that to say that  
15 in terms of what -- that Mr. Albee did not offer any specific  
16 advice on what the scope of protection of any particular  
17 copyright claim registered might be. The emphasis was on  
18 what type of application would be -- might be I should say --  
19 registerable by the Copyright Office.

20 Q During that conversation did you inform him that  
21 the videotape that you had in your hand was recorded in the  
22 United States?

23 A Yes.

24 Q Did you tell him that this videotape was made  
25 especially for filing with the Copyright Office?

sac6

1 A I had told him that the information I had received  
2 from Mr. Cohen is that he had received information I believe  
3 from some source suggesting that a way to protect the work  
4 in which Midway was asserting a claim to copyright was to  
5 make a videotape as was made, such as I had with me at the  
6 time of our February 26 meeting.

7 Q Did you ever represent to him that this videotape  
8 submitted with the application that became PA-59-977, or  
9 Galaxian, was used in promotional or advertising purposes?

10 A No.

11 Q Did you ask Mr. Albee to grant you any special  
12 relief to submit a videotape in lieu of a game or any other  
13 deposit of work?

14 A That provision of the regulations and its terms  
15 was never discussed, however it was implicitly --

16 MR. PLAIA: Will you let him finish his answer.

17 THE WITNESS: It was implicitly discussed during  
18 our February 26th meeting.

19 BY MR. KINNEY:

20 Q How do you implicitly discuss?

21 A Well, there is a difference it seems to me between  
22 formally saying, "We are making a petition for special  
23 relief from the deposit requirements," and discussing cir-  
24 cumstances which give rise to that need. At the February 26  
25 meeting all of the facts relevant, it seems to me, in my

1 opinion at that time, all of the relevant facts of which  
2 I was aware concerning what an appropriate deposit might  
3 be, what a copy of the work might be, what the videotape  
4 was, how it had been made, when it had been made, were  
5 conveyed to Mr. Albee. And in the course of discussing what  
6 the appropriate, for example, application form in which to  
7 apply to register the claim to copyright was, we of course  
8 had to consider the nature of the deposit, the nature of  
9 the work, what the copies might be.

10 Q I don't want you to testify as to what you  
11 considered. Can you give us, as best you can recall, the  
12 conversation with Mr. Albee on February 26th?

13 A Certainly.

14 Q What did he say and what did you say.

15 A The conversation began by my explanation of,  
16 here is the videotape. The videotape contains essentially  
17 performances of the videogame being played; it shows the  
18 different views of the arcade game. At that time I didn't  
19 know whether, for example, a copyright notice was on it or  
20 not. I had just received the stuff that morning and had  
21 not reviewed the tape myself. What I was telling Mr. Albee  
22 essentially was what I had been told.

23 I explained that our object was to register a  
24 claim to copyright in the videogame, and I had with me a  
25 VA application form -- I suppose I had some notes on it. I

sac8 1 tried to find that form, and I can't find it. I am not even  
2 sure I even showed it directly to Mr. Albee. But my thinking,  
3 I suppose there is no problem -- I think it is relevant.  
4 My thinking in going in had been that probably because, and  
5 this was conveyed to Mr. Albee in conversation, that it  
6 seemed to me that what we were dealing with was analogous  
7 to a game, sort of a dynamic game where possibly it could  
8 be viewed as having a series of changing game boards, for  
9 example. And at a minimum, of course, I stated that the  
10 graphic work and configurations of graphic work I thought  
11 were copyrightable subject matter. In drawing the analogy  
12 to the game, that it seemed that games were ordinarily  
13 classified in Class VA copyright office regulations.

14 We had discussed that. Mr. Albee then, because  
15 of this analogy that I was trying to draw to a game, suggested  
16 that it would be well to call in Mr. Vernon Dietz, who is  
17 a VA examiner in the visual arts group of the Copyright  
18 Office I believe at that time.

19 At about that time, either while we were waiting  
20 for Mr. Dietz, or possibly prior to that time -- incidentally  
21 I had told Mr. Albee, and I think that the word that I  
22 used was that the work generated on the screen, or the  
23 material that appeared on the screen of the videogame was  
24 generated by what I referred to as a hard wired machine.  
25 That was a question that Mr. Albee may have asked in a

sac9

1 different form as well. And his concern was that he felt that  
2 in view of the Intel litigation in the Northern District of  
3 California that he again specifically mentioned that the  
4 Copyright Office would have particular problems with pro-  
5 tecting something as a micro-circuit chip as a work. Kind  
6 of a dominant theme that underlied the rest of our conversa-  
7 tion about what an appropriate application and form of  
8 application might be.

9 I would also say, and I suppose I should add at  
10 this point, that Mr. Albee had made it clear from the outset  
11 that at the time an application was filed an independent  
12 examination of that application would be made, and that he  
13 was not binding himself or the Copyright Office in any way  
14 in our conversations. That was stated explicitly several  
15 times during our conversation. I also represented to Mr.  
16 Albee that I was representing Midway, I was working with the  
17 firm in Chicago, and that I did not have the authority to  
18 make independent decisions concerning what route to protect  
19 the work might be.

20 Then Mr. Dietz arrived, and the three of us  
21 discussed -- this was in Mr. Albee's office. Mr. Dietz  
22 arrived and we discussed the appropriateness of the visual  
23 arts application. It was Mr. Dietz's opinion that a work  
24 such as this was not appropriately classified in the visual  
25 arts group.

sac10 1           Then again I returned to my arguments concerning  
2 the analogy to games, the presence of copyrightable subject  
3 matter particularly at a minimum. Speaking at a minimum  
4 level, the graphic arts, the configurations of graphic arts  
5 that appear on the screen of the game. Understand that the  
6 focus of this conversation was on the videogame and was  
7 prefaced by a description of what was shown on the videotape.

8           Mr. Albee, after Mr. Dietz had stated that he  
9 felt quite strongly that an application for registering these  
10 claims to copyright was not appropriately classified in the  
11 visual arts group, suggested that perhaps the application  
12 could appropriately be made in the performing arts group  
13 on the PA form, and drew an analogy to a choreographic work  
14 where, for example, a videotape or motion picture could be  
15 taken of a dance work -- his is Mr. Albee's suggestion --  
16 of a dance being performed on the stage and suggested that  
17 this videotape would protect the choreographic work itself  
18 which could otherwise be protected, for example, by  
19 choreographic notations and separately registered it would  
20 arguably protect the set on the stage, background or whatever  
21 might be on the stage and might be copyrightable subject  
22 matter. He suggested that drawing an analogy of the videotape  
23 that I had to this choreographic work seemed like the PA  
24 form, that the performing arts group would be the appropriate  
25 place given what our deposit was. And understand that I

1 had gone in saying, "I have a videotape. We wish to deposit  
2 this videotape in connection with an application to register  
3 a claim to copyright." And at the same time I believe it  
4 was quite clear, as I have indicated what our discussions  
5 were, that what we were talking about was protecting a  
6 videogame, in particular, as I repeatedly emphasized to  
7 Mr. Albee, it was the material that appeared on the screen  
8 of the videogame is what was being sought to be protected.

9 We discussed that. Mr. Albee gave me, because  
10 this deposit thing was a bit of a problem Mr. Albee gave  
11 me a sheet that is more or less an informal in-house  
12 Copyright Office summary of the regulations having to do with  
13 the deposit of "motion pictures". On that sheet there were  
14 listed -- let's see, there was a statement to the effect  
15 that of course the deposit to accompany the work was "this  
16 is a copy of the best edition published in the United States."  
17 The form also then, as to videotapes published work set out  
18 a hierarchy of the type of deposit that the Copyright Office  
19 preferred. Such things as, you know, a half inch tape  
20 might be preferred to a three-quarter inch tape. The most  
21 preferred type of deposit was a videotape most widely  
22 distributed in the United States. We had some discussion  
23 about that.

24 Mr. Albee talked about the problems that the  
25 Copyright Office was having in getting a videotape machine,

12 1 that a request to purchase this thing had been pending for ice  
2 a year or two and they still didn't have one. There was a  
3 question -- I had a VHS tape. Subsequently, incidentally,  
4 as you are probably aware, the tape that was deposited  
5 eventually with the PA application was a beta tape that  
6 I had duplicated. I had transferred from the VHS tape  
7 over to the beta tape in light of my conversation with Dave  
8 Albee because I had understood that the machine that the  
9 Copyright Office was to be getting shortly, they expected  
10 any time, was a beta tape. We had a VHS tape. We discussed  
11 those types of things.

12 Q But the representation was of Mr. Albee that this  
13 general conversation was not to be regarded as related to  
14 any specific application?

15 A No. It was obviously related to a specific  
16 application. It was represented as being related to a  
17 specific application that was to be made, and the question  
18 being discussed was the form of the application that was  
19 to have been made. No representation was made by Mr. Albee  
20 that any statements that he made could be construed as a  
21 commitment on his part or on the part of the Copyright  
22 Office that, you know, sort of any explicit agreement that  
23 if I did this, then the claim to copyright would be registered.

24 Q Okay. Mr. Albee was not making any agreements at  
25 that meeting?

sac13

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A. Mr. Albee was stating what Copyright Office policy was and this type of works, what his opinion of copyright policy might be with regard to the problem that I had presented to him.

Q And this meeting was before the preparation of PA --

A. It was one week before I believe the PA application was filed.

end 2

ph-1

1 BY MR. KINNEY:

2 Q It is either eight or nine days --

3 A Well, I'm not sure about your dates here. My  
4 recollection is that it was about a week.

5 Q Okay. Now, at the later meeting or meetings  
6 with Mr. Albee, did he ever give you any special permission  
7 to file a video tape in lieu of a copy of the work?

8 A Would you repeat the question again?

9 Q At any meetings subsequent to this meeting,  
10 did Mr. Albee give you any, quote, "special permission",  
11 unquote, to file a video tape in lieu of a copy of the  
12 work?

13 A You are again referring to the Galaxian work?

14 Q Yes.

15 A Right, well I have already said that the only  
16 other meeting that I recall was his review -- at the time  
17 I filed the application papers Mr. Albee did not raise  
18 that question in specific terms, no formal petition was  
19 made by me.

20 Q Did you informally, orally ask for such a thing?

21 A Well, in response to your previous question,  
22 I think that my response was at no time did I make, you  
23 know, orally or in writing a request for permission to  
24 -- for permission for a substitute deposit, in those words,  
25 under the statute.

1 And I represented that I think that had been  
2 implicitly, to whatever extent my opinion is worth anything,  
3 had been implicitly discussed in the previous meeting.  
4 And I think I've explained the circumstances of why it  
5 was that had been discussed in the previous meeting.

6 Q Now, in the discussions that led to the PacMan  
7 and Rally-X copyright registrations, first of all, were  
8 there discussions with respect -- with Mr. Albee or any --  
9 or the examiner handling the PacMan and Rally-X applications  
10 for registration of claim to copyright?

11 A There were no discussions other than what occurred  
12 when the application papers were filed in the customary  
13 procedure for the handling, the request for special handling  
14 was pursued.

15 Q So as -- with respect to PacMan and Rally-X,  
16 there is no -- there was no additional request for special  
17 permission, formal or informal, of any kind, to your knowledge?

18 A No.

19 MR. KINNEY: That concludes my direct examination.

20 JUDGE MATHIAS: Mr. Plaia?

21 MR. PLAIA: Your Honor, may I have five minutes?

22 JUDGE MATHIAS: All right --

23 MR. PLAIA: The allegations involving this segment  
24 of the case we consider to be quite serious and involve  
25 the professional integrity of an attorney and a company,

1 and we want to take our time if we could have some time.

2 JUDGE MATHIAS: I'll give you five minutes.

3 (Whereupon, a recess was taken.)

4 JUDGE MATHIAS: All right, back on the record.

5 I'm going to stick pretty close to my time limits today.

6 If somebody doesn't make it back, well, we'll just proceed  
7 without them, because we are going to have to squeeze  
8 an awful lot of hearing into today.

9 So you may proceed, Mr. Plaia.

10 CROSS-EXAMINATION

11 BY MR. PLAIA:

12 Q Mr. Larson, in regards to the Galaxian PA-59-977  
13 meeting of February 26, 1980, can you tell me exactly  
14 when you entered the meeting with Mr. Albee, can you tell  
15 me exactly how you started that meeting?

16 MR. KINNEY: I have to object to the question,  
17 since the PA-59-977 Galaxian was not in existence or even  
18 applied for at the time of that meeting.

19 JUDGE MATHIAS: Maybe you could just refer to  
20 the meeting without referring to the application at this  
21 point, Mr. Plaia.

22 BY MR. PLAIA:

23 Q In regards to the February 26th meeting that  
24 you testified to, can you tell me how that meeting started?  
25 Exactly what you said when the meeting started.

1           A     I'll try and paraphrase it as best I can. I  
2 had been called by a firm in Chicago who represented --  
3 and I can't specifically recollect whether I said that  
4 the firm in Chicago represented Bally or Midway.

5                 But, in any event, that I had been called by  
6 the firm in Chicago who represented this party. That  
7 we sought protection in the video game. That I thought  
8 it was necessary for him to understand the situation I  
9 was presenting to him, that he understand at least what  
10 I understood about the video game.

11                And stated that as it had been explained to  
12 me the -- what appeared on the screen of the video game  
13 was generated within the computer or within the video  
14 game by -- that -- how the machine generated this was  
15 essentially a hard-wired program.

16                Mr. Albee interrupted to ask whether there was  
17 any software associated with this machine, or associated  
18 with the generation of what appeared on the screen. And  
19 I said to the best of my knowledge, no.

20                That at a minimum I felt that copyrightable  
21 subject matter involved in that game were the graphic  
22 symbols that appeared on the screen; that the game generally  
23 involved -- that it had a -- was what could be termed  
24 a space wars video game.

25                That the object of the -- or kind of the plot

1 of the game is that the player was the defender and was  
2 being attacked by an alien convoy.

3 You know, the object of the game was to destroy  
4 the convoy. This was the sorts of things that appeared  
5 on the screen at that time. I don't think that I knew,  
6 really, the preferatory things that appeared on the screen,  
7 like the scoring table and that sort of thing I don't  
8 believe I had any knowledge of that at that point and,  
9 hence, didn't convey that to him.

10 And that the firm in Chicago, someone that was  
11 the source of my information had been informed that a  
12 way to seek protection in such a game was to make a video  
13 tape of the game.

14 I had the video tape with me and set it on the  
15 table, and said that this video tape was the -- well,  
16 incidentally, you know, that it had been suggested to  
17 the firm in Chicago that a video tape might be an appropriate  
18 way to pursue sort of protection of the copyright claim.

19 And, accordingly, the video tape had been made.  
20 And, you know, placed the video tape on the table and  
21 then suggested that it seemed to me that when one considers  
22 the operation of the game and what appears on the screen  
23 in a repeated fashion, or what happens when a game is  
24 being played, for example, is that there is a game board  
25 that appears on the screen, that the player -- the actions

1 of the player, of course, will affect what happens on  
2 the screen.

3 But that -- the -- there is a general pattern,  
4 sort of set within the sequence of operations that the  
5 machine goes through in terms of generating what the game  
6 board is, although it changes from time to time.

7 And suggested that on that basis that the work  
8 be considered or be analogized to a conventional game  
9 board such as Monopoly.

10 MR. KINNEY: Your Honor --

11 THE WITNESS: And at that time, Mr. Albee, after  
12 my having made that suggestion --

13 MR. KINNEY: Your Honor, it does appear that  
14 the witness is repeating much of what he said earlier.  
15 And in view of the short time I would ask that the Court  
16 instruct him to just, you know, add to his previous --  
17 anything he omitted from his previous comments.

18 JUDGE MATHIAS: Some of it may have to be repeated,  
19 but I would ask that you would limit your answer to the  
20 question which was your opening remarks, of course, and  
21 not go beyond that, and try to repeat yourself as little  
22 as possible.

23 MR. PLAIA: May I speak to this just for a second,  
24 Your Honor? That is that I think it's very important  
25 that the record reflect specifically what was said by

1 Mr. Larson in as much detail as we can create.

2 JUDGE MATHIAS: I am allowing him, Mr. Plaia,  
3 but I am just asking that he not go beyond his opening  
4 remarks and go through the entire story again.

5 MR. PLAIA: Okay.

6 BY MR. PLAIA:

7 Q Mr. Larson, I believe you said that at that  
8 time that you suggested a PA?

9 A I had suggested the VA application; it was Mr. Albee  
10 that suggested the PA, the Performing Arts application.

11 Q And what happened -- what was the next thing that  
12 happened in the meeting, and was said in the meeting after  
13 he made that suggestion?

14 A Mr. Albee drew the analogy between the situation  
15 that I had presented to him and the choreographic work prob-  
16 lem that I described in my response to Mr. Kinney's question.

17 Q Okay, then what happened next?

18 JUDGE MATHIAS: I am wondering now, Mr. Plaia, are  
19 you just going to have him repeat the story again that he  
20 told? He told it in some detail. Is there something that's  
21 missing?

22 I appreciate your need to have the whole story  
23 told here, but do we need to repeat everything again?

24 MR. PLAIA: I want the record to show specifically  
25 what was said between -- when he was with Mr. Albee,

ph8

1 and during this meeting he's testified that Mr. Dietz  
2 was called, and I wanted to establish what was said when  
3 Mr. Dietz was at the meeting, because Mr. Dietz will be  
4 testifying.

5 JUDGE MATHIAS: Well, why don't we ask that  
6 question, Mr. Plaia. The way you are asking the question,  
7 we are just getting a repetition of what he stated before.  
8 He went into great detail on the whole series of events  
9 in Mr. Albee's office, including when Mr. Dietz was called  
10 in, etcetera.

11 Now if you want to establish that more clearly,  
12 if you're not satisfied, let's pinpoint those matters  
13 rather than just having him recite it all again. We are  
14 going to be here until almost midnight as it is, it appears  
15 to me.

16 And I --

17 THE WITNESS: Well, perhaps if I could make  
18 a brief statement of how I recollect or what was said  
19 in Mr. Dietz' presence, as compared to what I talked about  
20 earlier, I think that -- when Mr. Dietz came in Mr. Albee  
21 gave a summary of what I had previously stated about the  
22 video game, how the video game was played, what the video  
23 tape showed that I had, the VHS tape that I brought with  
24 me.

25 And asked me to repeat what I had said about

1 the analogy to a game board. And Mr. Dietz then gave  
2 that matter some thought and it was -- and made his statement  
3 that he felt that the Visual Arts classification was not  
4 necessarily the most appropriate one for this work.

5 And it was at that subsequent time that Mr. Albee  
6 suggested the use of the Performing Arts, corresponding  
7 to the work in the Performing Arts classification.

8 And we discussed the analogy to the choreographic  
9 work and the video tape -- use of the video tape as a  
10 deposit and a means of protecting the copyrightable subject  
11 matter embodied in the game.

12 BY MR. PLAIA:

13 Q Mr. Larson, let me ask you, After Mr. Dietz  
14 entered the meeting, did he stay through the end of the  
15 meeting?

16 A Yes, to the best of my recollection he did.

17 Q When the meeting was coming to a close or coming  
18 to an end, did either Mr. Dietz or Mr. Albee state any  
19 conclusions?

20 A Their conclusions were that given the vide  
21 tape deposit and what had been said that it was their  
22 opinion that the best way to proceed with this thing was  
23 to use a Performing Arts application form.

24 And I had, as I said, represented earlier that  
25 I could not make any independent decision about what way

1 we eventually would proceed would be.

2 Mr. Albee had referred to the Intel litigation  
3 in California, as I said, and made reference to a European  
4 patent journal where an article had been made, rummaged  
5 through his drawer for this.

6 It was -- he stated that his concern about this  
7 whole thing was that -- as the Intel matter concern --  
8 was that a microcircuit chip not be protected by whatever  
9 claim to copyright was made.

10 And that seemed -- he represented to me that  
11 that was really his principal concern in this matter.  
12 That the microcircuit chip not be protected as a work  
13 of art which was -- as he represented to me.

14 I had no independent knowledge of the thing  
15 at that time was that the argument being made by Intel  
16 was that they were claiming copyright in the microcircuit  
17 chip as a sculptural work.

18 And I again pointed out that that was not the  
19 assertion that I was making or the theory that I was present-  
20 ing to them.

21 That we were -- that the work that we were concerned  
22 with had nothing to do with the microcircuit chip, per se.  
23 That that could, indeed, be a copy. And Mr. Albee was  
24 sort of ambivalent about whether that could be the case  
25 or not.

ph11

1 But, quite clearly, he agreed that what appeared  
2 on the screen would constitute a copyrightable subject  
3 matter. He requested that when I filed the application  
4 that he at least be called.

5 And that the -- he indicated that he would prefer  
6 that an application be directed to his attention. He  
7 led me to believe that he intended to discuss what I had  
8 presented to him further with other copyright officials.

9 He mentioned Mary Beth Peters' name, in particular.

10 Q Did he mention any other names?

11 A Not that I recall.

12 Q You mentioned one thing that Mr. Dietz said,  
13 and that was concerning the type of application. Did  
14 he add anything else to the meeting?

15 A Mr. Dietz?

16 Q Yes.

17 A No, by and large he was standing up by the wall  
18 and he didn't -- Mr. Albee was kind of the leading person,  
19 in terms of the conversation that was occurring during  
20 most of the time Mr. Dietz was present.

21 Q Did Mr. Albee say whether this was the first  
22 time he had dealt with a video game?

23 A Well, he -- I had stated that I believed that  
24 Eric Cohen had spoken with someone in the Copyright Office  
25 who had suggested this. He did not say anything specific

1 about a previous application, although the impression  
2 that he gave me from his facial expression was that he  
3 could well have had a prior -- you know, that something  
4 was going through his head and he wished not to say much  
5 about it.

6 Q In Mr. Dietz' presence, was anything discussed  
7 about the video tapes-- I'm sorry, the video tape that  
8 you had with you?

9 A Yes. The -- Mr. Albee -- I believe it was  
10 Mr. Albee and not myself who sort of recapitulated what  
11 I had previously told Mr. Albee about, you know, the tape  
12 being made by Midway.

13 That it was a video tape that we wished to submit  
14 as a deposit with whatever copyright application we used.  
15 And, again, I don't think I mentioned this earlier: Mr. Albee  
16 did specifically ask me whether the video tape had been  
17 published.

18 And I said, "To the best of my knowledge it  
19 had not; it had just been prepared." Mr. Albee did suggest  
20 that we consider a publication of the video tape, sort  
21 of a pro forma thing.

22 Either selling a copy to somebody or, you know,  
23 displaying the thing publicly in some manner. And I --  
24 my response to that suggestion was that it could be consid-  
25 ered, but I didn't -- that I would raise the question with

1 Mr. Cohen, that I didn't think that it seemed particularly  
2 useful to do that. But again, no firm representation was  
3 made regarding that, although quite clearly I stated that  
4 the videotape had not been published at the time of that  
5 meeting.

6 Q Do you have any doubts about that at all?

7 A No, I do not.

8 Q Approximately how long did this meeting take  
9 place?

10 A My guess is it probably lasted around 45 minutes.

11 Q And where did the meeting take place?

12 A Mr. Albee's office.

13 Q During how many of the 45 minutes was Mr. Dietz  
14 present?

15 A 20 minutes to half an hour.

16 Q Okay. After this meeting, what did you do next  
17 regarding the Galaxian matter?

18 A I reported, of course, with the -- the discussions,  
19 to Eric Cohen in Chicago, by phone. As I believe, that  
20 conversation was on a Tuesday. Subsequently I think on  
21 Wednesday or Thursday, sometime shortly after the meeting,  
22 I received from Eric the Midway-Galaxian brochure that  
23 was registered concurrently, registration was applied for  
24 concurrently with the audiovisual work. On the Friday  
25 I had a professional photographer take pictures of the

1 videotape and viewed the videotape myself, the application  
2 was prepared; you know, as I recollect it, I prepared the  
3 thing on Monday and filed the thing on Tuesday. Which  
4 would have been a week after the conversation I had with  
5 Mr. Albee, although I can't be absolutely certain of that.

6 Q Okay. I think you indicated that you personally  
7 went in to file the application and that you at that time  
8 met with Mr. Albee.

9 How long was that meeting?

10 A I'd say Mr. Albee came and left. I was there  
11 longer. He was summoned, and he came down and he was there  
12 maybe three to five minutes at the most.

13 Q When you first got to the Copyright Office, did  
14 you talk with anybody before you talked with Mr. Albee?

15 A Yes. The Public Information Officer, I believe  
16 the Public Information Officer's name was Don Leach. Although  
17 that, whoever it was would be apparent from the records  
18 filed at the Copyright Office. But I believe it was Don  
19 Leach.

20 Q And did -- what did you tell Mr. Leach?

21 A Essentially, I just presented the application  
22 papers, noting that there was a request for special handling,  
23 and then the three examiners, the one from the literary  
24 group, one from the performing arts group, and I specifically  
25 told the Public Information Officer that I'd spoken with

1 Mr. Albee about this application, that he had requested  
2 that he be called when I brought the application papers  
3 in. Of course I'd represented at a previous meeting too  
4 that this was a matter that we wished to expedite. Probably,  
5 I probably did not use the term request for special handling  
6 at that time. I'm not too sure I was aware of it.

7 Q Okay. Then Mr. Albee came?

8 A Mr. Albee came and we, you know, exchanged some  
9 casual conversation, since we'd had the fairly lengthy  
10 meeting before and I think both of us were interested in  
11 the thing, just -- it was an interesting problem, and he  
12 took the application, reviewed it, and looked at me and  
13 said it looks fine and gave it back to the public information  
14 officer.

15 Q How long did that take?

16 A His review of the application?

17 Q Yes.

18 A Oh, 15, 20 seconds, probably.

19 Q Did he say anything at all to you at that time?

20 A Other than it looks fine, no, he asked no specific  
21 questions about anything that I can recall.

22 Q Did you say anything to him specifically at that  
23 time?

24 A Well, I think I -- I said you know, we decided  
25 to go with the performing arts type of form. I pointed

1 out that we had some problems deciding for example, there's  
2 a space on the form, "Type of Work." We had some difficulty,  
3 I had some difficulty trying to decide what the appropriate  
4 term was, and made a comment to that effect to him, as  
5 well as the "Author Of" portion and explained why I had  
6 selected the words I had selected to put in those forms,  
7 and he, you know -- as I said I don't -- I mean if he said  
8 anything, it wasn't significant, that I recall. And he  
9 reviewed it and said, it looks fine to me.

10 Q You said that you had a special matter that you'd  
11 put in the author form. Are you talking about under (1)  
12 where it says "Author of"?

13 A Yes.

14 Q What did -- what was put in there that you were  
15 mentioning to him?

16 A The audiovisual work. There had been some thought  
17 about putting other terms in and it seemed to be the most  
18 appropriate one. Particularly in view of what our prior  
19 conversations had been, seemed to fit.

20 Q Yes. I think you told me what was put under  
21 the nature --

22 A Oh, "Type of Work." "Author of." I think what  
23 I put down in there was entire work. I'm open to correction  
24 on that, I don't specifically --

25 Q Well --

1 A -- recall that.

2 Q Is the thing that you mentioned to him, audiovisual  
3 work?

4 A Both of those categories.

5 Q Both of those.?

6 A Yes.

7 Q Okay.

8 (Pause)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

nd 3A

BY MR. PLAIA:

Q Did you make any reference or point out to him the brochure that was also being filed?

A Well, I don't think I did. The Public Information Officer had both of those applications and I believe may have said something about that. I'm not really sure.

It was my practice when I filed these applications, particularly where there was sort of a -- with these PA forms and where there were related brochures, it was my practice to include, to use one cover letter for transmitting the applications with reference to all of the applications that were then being filed so there would be no -- so that one cover letter could accompany each application and that there would be no question about the relationship between these things.

Q Let me maybe clarify. I am talking about the brochure, a brochure deposit with separate brochure deposit with the audio visual or PA application.

A The synopsis of the deposit, the whole of the application papers were reviewed by Mr. Albee, which would have included the cover letter, the completed and executed form PA, the synopsis of the deposit and the material that was attached to that synopsis of the deposit and the request for special handling.

Q Was the brochure a part of the synopsis?

1 A Yes, I referred to the brochure as -- the reason  
2 I included it was to, since I was aware that the Copyright  
3 Office probably would not be able to examine the video  
4 tape, per se, since they didn't have the machines to look  
5 at it, I wanted to give them as much information as I could  
6 about what was on the video tape and thought that the brochure  
7 would be an appropriate way to do that.

8 MR. PLAIA: Your Honor, I would want to mark as  
9 an exhibit a letter from Depaoli O'Brien consisting of  
10 two pages and it's not signed because it's their file  
11 copy and it's to the Register of Copyrights, and it's dated  
12 March 5, 1980 and I can supply two copies to you as soon  
13 as possible of this after we mark it.

14 JUDGE MATHIAS: All right. What exhibit will it  
15 be designated?

16 MR. PLAIA: I believe it would be CX -- well, I  
17 believe I would be -- so, it would be CRX-1.

18 JUDGE MATHIAS: All right, the document may be  
19 marked CRX-1.

20 (The document referred to  
21 was marked for identification  
22 as CRX-1.)

23 BY MR. PLAIA:

24 Q Mr. Larson, can you identify this document?

25 A Yes. This is the cover letter that accompanied

Acme Reporting Company

(202) 628-4888

(202) 628-4888

1 the PA application for Galaxian and the concurrently filed  
2 TX application for the brochure entitled "Midway's Galaxian."  
3 It was signed by me, delivered to the Copyright Office.

4 Q I notice that on this letter, under Section 1(b),  
5 you have noted that -- it says 1(b) video tape deposit, and  
6 then is parenthesis it says "one copy."

7 A Yes.

8 Q Can you tell me what you meant in writing this  
9 letter by "(one copy)" after that wording?

10 MR. KINNEY: Your Honor, I have to object. The  
11 letter speaks for itself. No problem with the question,  
12 ask if he represented that to someone else, but as meaning  
13 something, but as to what was in his mind.

14 JUDGE MATHIAS: Well, first of all, let's have  
15 the document admitted into evidence. Is ther any --

16 MR. KINNEY: I have no objection.

17 JUDGE MATHIAS: -- objection to the receipt of  
18 the document being received in evidence.

19 MR. KINNEY: I have no objection except I don't  
20 have a copy yet.

21 JUDGE MATHIAS: CRX-1 is received in evidence.

22 (The document referred to, having  
23 been previously marked for identi-  
24 fication as CRX-1, was received  
25 in evidence.)

1 JUDGE MATHIAS: May I see the document, please?

2 (Pause)

3 JUDGE MATHIAS: I will allow the question.

4 THE WITNESS: Well, the intention was depending  
5 upon the status of the work, published or unpublished or  
6 the type of work it is, the copyright regulations specify  
7 either one or two copies. And copies, referring to, you  
8 know, how many deposits, units of deposit have to be made  
9 and that was my intention and my thinking in terms of the  
10 deposit requirements was that there was one video tape  
11 deposit made, one copy of the video tape.

12 BY MR. PLAIA:

13 Q In your earlier testimony you testified concerning  
14 copies and the use of the word "copy". Was that being  
15 used --

16 A I had some problems with Mr. Kinney's question  
17 earlier because I -- it's a question of law I suppose in  
18 a way whether, particularly in this instance, what may be  
19 a copy of the work that's, that's subject to the copyright  
20 claim. I don't -- I didn't answer any questions. I did  
21 not intend to represent that I was making a legal conclusion  
22 as to what may be a copy or what may not be a copy. I  
23 don't suppose that's really my function.

24 Q So, is it correct, then, that when you said "one  
25 copy" you mean one unit of that tape?

1 A That was not using "copy" in the sense of this  
2 statutory definition of "copy."

3 Q And you were talking about being there with Mr.  
4 Albee, and you talked about what was said. How did that,  
5 how did that meeting end?

6 A Which meeting, Mr. Plaia?

7 Q This would be the meeting when the application  
8 was made.

9 A Well, the meeting ended by -- well, while Mr.  
10 Albee was there, it looks fine and he indicated that he was  
11 very interested in the application and the copyright that  
12 was involved and wished to follow whatever proceedings  
13 happened. As a matter of fact, I recall specifically his  
14 comment that sort of a problem that, or quote "problem", he  
15 had is copyright office examiner was that in passing on  
16 questions of registerability frequently in litigation the  
17 matters were decided on a preliminary injunction basis and  
18 he said it was hard to follow some of these things and he  
19 was interested in following this and made a comment of that  
20 sort. And that was basically how the -- my conversation  
21 terminated with him at that time.

22 Q Did Mr. Albee ever indicate to you that he had  
23 a background in law?

24 A No, he did not.

25 Q Did he ever indicate in any way what his background

1 was?

2 A Yes, well, well, no, I am not -- I had then and  
3 have now no idea of what his educational background is. I  
4 do know that -- I'm not sure that he specifically represented  
5 this to me or not, but the other people, Public Information  
6 Officers for example, it said that the Copyright Office  
7 sponsors what could be considered law courses on copyrights  
8 and that all of the officials were trained, I suppose,  
9 in that copyright law in a sense.

10 Q Next, can you tell me what the events were that  
11 led up to the filing of the Galaxian Attract Mode application  
12 which was PA 68-323?

13 A Yes. Just basically, I received a request from  
14 Eric Cohen again to prepare and file an application in the  
15 same manner we had done in the Galaxian case for the  
16 Attract Mode and Eric told me that the Attract Mode was that  
17 work that appears on a repeating basis on the screen of the  
18 video game to attract players.

19 I prepared the application. Because of the short-  
20 ness of time, I was leaving Washington to go to the Midwest,  
21 and I completed the application on a Friday, I believe, or  
22 something like that and because I was unable to -- didn't  
23 have time to take the application papers over, I asked  
24 an associate if he would handle it for me, Marion DeLong,  
25 because he was completely, or I suppose we had talked

1 casually about these cases to some extent, but he really  
2 was not informed about what was involved. I attempted to  
3 discuss the matter with him and had all the papers laid out  
4 for him to take over the following working day.

5 Q And were the papers filed?

6 A Yes.

7 Q And do you know who filed those?

8 A Mr. DeLong.

9 Q Did you have any discussions with Mr. Albee  
10 concerning that application?

11 A No, not that I recollect.

12 Q Did you have any discussions with anybody else  
13 from the Copyright Office concerning that application?

14 A No.

15 Q Can you tell me what the events were leading up  
16 to the Pac-Man application filing of PA 83-768?

17 A Well, essentially it was pretty much the same thing  
18 as the Galaxian Attract Mode. I received a request prepare  
19 and file the application and received a letter conveying  
20 information for the application form. I called Eric to  
21 -- Eric Cohen -- to complete that information, completed  
22 the application, filed it myself in that instance.

23 Rally-X, as I think I mentioned before, I  
24 received a completed --

25 Q Let me stop you. I am talking about Pac-Man.

1 A Okay.

2 Q You say you filed the application yourself. Does  
3 that mean you physically went to the Copyright Office and  
4 filed it?

5 A Right, with the request for special handling and  
6 followed the same procedure that I described before.

7 Q Did you first then speak with the Public Informa-  
8 tion Officer?

9 A Yes.

10 Q Do you remember who that was?

11 A Well, I -- not really. In one of those, the  
12 guys name was kind of strange. It was Dave Altoliani, or  
13 something like that. It appears on the copyright office  
14 receipt. As a matter of fact, I can testify -- I guess  
15 from my own personal knowledge -- that the Copyright  
16 Office receipt indicates on there the signature of the  
17 Public Information Officer is the person that I met with  
18 and on the receipt will be noted "attention" and two or  
19 three names will be listed. The names listed are the  
20 examiners who were called and reviewed the assignments and  
21 applications in my presence.

22 Q Can you tell me who you spoke with besides the  
23 Information Officer concerning the Pac-Man application on  
24 that day that you filed it, from the Copyright Office?

25 A Pac-Man, I believe I spoke with Dave Albee

1 concerning the PA application and I guess it was a TX  
2 application in connection with that, but I don't recall who  
3 that might have been.

4 Q Let me show you RX-20, which might refresh your  
5 recollection.

6 A Ah, okay. Dave Albee was the examiner who was  
7 called to examine the PA application. Mark Thur was the  
8 person from the Assignment and Document Section called to  
9 review the assignment, and this Lee Altloyaolit, whatever  
10 and I hesitate to even try to pronounce the name, was the  
11 literary examiner, his name appears on here. The Public  
12 Information Officer handwritten at the top of this sheet  
13 in my handwriting is Marie Fleming. And I believe that is  
14 the person who was the Public Information Officer in  
15 connection with this Pac-Man application.

16 Q With regards to meeting with Mr. Albee that day,  
17 how long did you meet with him for?

18 A Approximately the same amount of time as before.  
19 Again, I think we probably exchanged casual conversation,  
20 but even with that our time we spent together couldn't have  
21 been, you know, three to five minutes at the most again.

22 Q What did Mr. Albee do in regards to that application  
23 while he was meeting with you?

24 A Said it was fine.

25 Q Did he say anything else besides that it was fine?

1 A. Not that I recall.

2 Q Do you remember what you said to him at that time?

3 A. Specifically considering the application?

4 Q At any time during that three to five minutes that  
5 you were meeting with him?

6 A. Not really. I think that I may have made a comment  
7 to the effect that, you know, here's another one type of  
8 thing.

9 Q Respondent's Exhibit 23 was already shown to you  
10 and I want to show it to you again. I believe this was  
11 identified as a -- Respondent's Exhibit 23 which is a letter  
12 to the Copier, Register of Copyrights, two pages from Craig  
13 E. Larson, and I call your attention to Page 1, Section  
14 1(b) where it says "video tape deposit," and I notice there  
15 is, in parenthesis it says "one copy" and I'll just ask you.  
16 You previously testified in regards to the same language  
17 in the similar letter for Galaxian.

18 Would your testimony be the same regarding this,  
19 language?

20 A. Yes.

21 Q Now, with this Pac-Man deposit, did you also present  
22 a separate brochure as part of the synopsis of the PA  
23 deposit?

24 A. In that case, I, boy, I may not have. The Copyright  
25 Office is -- my intention in submitting the thing in the

1 first place was I didn't feel without being able to view  
2 the videotapes, the Copyright Office could do a very compe-  
3 tent job of examining what the work was, what the copyright  
4 was. And my understanding had been during this intervening  
5 period the Copyright Office had obtained a video tape  
6 machine.

7 Specifically whether I sub -- I incorporated the  
8 brochure into the Pac-Man PA application, I'm not sure, but  
9 I may not have for that reason.

10 Q Did you have any other contacts with or discussions  
11 with anybody from the Copyright Office after that meeting  
12 with Mr. Albee concerning the Pac-Man application?

13 A Other than notification that the claims had been  
14 registered and that certificates of registration were ready  
15 and that type of thing, formal communications, no.

16 Q Finally, with regards to Rally-X, the Rally-X  
17 application, that's PA 88-049, can you tell me what the  
18 events were that led up to the filing of that application?

19 A Yes. I received from Mr. Cohen, again, a letter  
20 requesting the preparation of, or I mean filing of a copyright  
21 application and accompanying the letter was a PA application  
22 that had been largely filled out, apparently Mr. Cohen had  
23 prepared. I prepared the request for special handling and  
24 the cover letter, synopsis of the deposit, I prepared the  
25 synopsis of the deposit I think in, from a conversation with

1 Eric as to what was on the tape.

2 Q Was your next step to then go to the Copyright --

3 A No, then I filed, I filed -- I believe in the  
4 Rally-X I received that information, filed it in the Copyright  
5 Office on the same day I received it.

6 Q Do you remember who you saw when you got to the  
7 Copyright Office that day?

8 A Well --

9 Q If I were to give you this receipt, which is  
10 RX-21, this might refresh your memory.

11 A In this instance, the PA application was brought  
12 to the attention of Dave Albee again and Helen Walker was  
13 the person from the Assignments and Documents Section called  
14 to review the assignment paper, and Peter Vankovitch was  
15 the Public Information Officer.

16 Q Do you recall that meeting with Mr. Albee, how  
17 long it was?

18 A Again, I can only say at a maximum it would only  
19 have been three to five minutes. It was no lengthy conver-  
20 sations. I don't recall any specific questions asked by  
21 Mr. Albee of me, nor did I volunteer anything specific at  
22 that time. I believe that other than Mr. Albee's expression  
23 that the application was okay and some casual non-related  
24 conversation, that that was the extent of our contact.

25 Q Regarding some earlier, responses to earlier

13  
1 questions by Mr. Kinney in describing the applications that  
2 you filed for Midway Manufacturing Company, the word  
3 "promotion materials" was mentioned. Can you tell me what  
4 "promotion materials" means to you?

5 A Promotion materials to me would mean materials  
6 prepared and used to, I suppose, promote interest in users  
7 of a company's product; purchase the product, use the product.

8 Q And when you are talking about promotion of --  
9 when you are speaking of promotional materials for copyright  
10 registration what type of materials are those?

11 A When I am speaking of promotional materials for  
12 copyright registration. Well, I suppose that in connection  
13 with these particular groups of registrations that the  
14 brochures that were registered on TX forms at the same time  
15 that PA applications, I would consider promotional materials.

16 Q Mr. Larson, did you review your files prior to  
17 this testimony today?

18 A Yes, I did.

19 Q And what did you review in the files?

20 A I reviewed correspondence, papers filed, any  
21 handwritten notes that were still in the files. I also  
22 reviewed the diaries that I kept during the period to --  
23 where I would as an ordinary practice have put reference  
24 to any conversations I would have had with Copyright Office  
25 officials.

14  
1 MR. PLAIA: Your Honor, that concludes my cross-  
2 examination.

3 JUDGE MATHIAS: Mr. Bailey? Turn on your microphone.

4 MR. BAILEY: May I have a five minute recess?

5 JUDGE MATHIAS: All right, we will have a five  
6 minute recess. It will be a bare five minutes. We will  
7 be back at 27 minutes after.

8 (Whereupon, a recess was taken.)

9 JUDGE MATHIAS: Back on the record. Mr. Bailey,  
10 you may proceed.

11 MR. BAILEY: Thank you, Your Honor.

12 CROSS-EXAMINATION (Continued)

13 BY MR. BAILEY:

14 Q Mr. Larson, I am the Commission Investigative  
15 Attorney and I want to explain to you my purpose here in  
16 this proceeding is one of providing effectively as possible  
17 a complete record for determination by the Commission.

18 What I would like to talk to you about, or ask  
19 you about first is your -- you have testified that you  
20 personally were responsible for registration of each of the  
21 copyrights and as enumerated on the exhibit, on the board;  
22 that is, Galaxian, Galaxian Attract Mode, Pac-Man, Rally-  
23 X and Gorf?

24 A That's correct. I signed off five applications.

25 Q With respect to Pac-Man and Rally-X, which are

5  
1 the subject matter of this proceeding, I would like first  
2 with Pac-Man, initially how did you become aware of the  
3 circumstances necessary for you to file the application?  
4 What I mean is the -- you had testified that Mr. Cohen  
5 had provided you with information. What were your -- what  
6 was the information that he provided you with? And, could  
7 you tell me that, please?

8 A Yes. We knew -- we knew from the previous applica-  
9 tions what was necessary to fill out the forms. And that  
10 was the information that was provided by Mr. Cohen. I would  
11 then -- and that was embodied in some instances in letters  
12 and in some instances in phone conversations with Mr. Cohen.  
13 And in all instances the -- where there had been any  
14 written communications conveying this information, I had  
15 phone conversations with Mr. Cohen to -- where the applica-  
16 tion was reviewed item by item. In some instances it was  
17 necessary for Mr. Cohen, in turn, to make further inquiries  
18 of Midway personnel concerning the appropriate responses,

19 Q Mr. Cohen is? Can you explain for my edification,  
20 who is Mr. Cohen?

21 A Mr. Cohen is an associate with the -- is an  
22 associate with the firm of Fitch, Even, Tabin, Flannery  
23 and Welsh in Chicago who represent, I guess you could say  
24 sort of primary counsel for Midway Manufacturing Company.

25 Q I see. He is there on-going counsel in their

1' general matters?

2 A. Mr. Cohen works with Mr. Katz and Mr. Welsh.

3 Q Okay. In your discussions in communications with  
4 Mr. Cohen with respect to the Pac-Man, had he made any  
5 representations to you about the contractual relationship  
6 between Namco America and Namco and Midway?

7 A. The answer to your question -- well, three companies.  
8 In connection with that application --

9 Q I can't hear you, Mr. --

10 A. I believe that he had made -- that we had --

11 MR. PLAIA: I object, Your Honor. I think this  
12 is outside the scope of what we are going into in examination  
13 with this witness.

14 JUDGE MATHIAS: Well, I'm not sure. I will allow  
15 some limited examination along this line. I'm not sure  
16 just where Mr. Bailey is going.

17 THE WITNESS: We had talked about the matter you  
18 referred to and in terms of deciding what the appropriate  
19 response on the application form to first date of publication  
20 was. And also concerning the assignment to be recorded along  
21 with the copyright application.

22 In Pac-Man particularly, I don't recall any  
23 extended conversations with Mr. Cohen concerning what you  
24 asked about.

25

1 BY MR. BAILEY:

2 Q Were you -- had you -- did you receive the  
3 license agreement or the accompanying memos to that license  
4 agreement between Namco and Midway?

5 MR. PLAIA: I am going to object again, Your  
6 Honor. That's I think a great deal outside of the scope  
7 of his testimony and we are getting into confidential  
8 information and we are also getting into attorney/client  
9 communications.

10 JUDGE MATHIAS: What is the purpose of this line  
11 of questioning, Mr. Bailey? Does this have to do with --  
12 just tell me the purpose.

13 MR. BAILEY: Okay. What I am attempting to clarify  
14 is that Mr. Larson had knowledge of the existence of these  
15 documents and also I think that the fact that the only  
16 documents registered were the assignment of copyright to  
17 Midway from Namco possibly raises some questions as to the  
18 issue that Mr. Kinney has put into this proceeding, which  
19 is fraud on the Copyright Office and I --

20 JUDGE MATHIAS: In what way, Mr. Bailey?

21 MR. BAILEY: The withholding of information.

22 JUDGE MATHIAS: Withholding what information?  
23 I mean --

24 MR. BAILEY: Well, Your Honor, I am concerned  
25 as to why the license and the accompanying documents between

1 Namco and Midway were not proffered to the Copyright Office.

2 JUDGE MATHIAS: Every single document between them?

3 MR. BAILEY: Not every single document. Only the  
4 documents which go into the contractual relationship between  
5 the author of the work and the would be, or the person,  
6 Midway who was attempting to get a copyright for that work.  
7 I think also the Copyright Act requires that all claimants  
8 be presented to the work and this -- the only claimant that  
9 was presented in the application by Midway was Midway and  
10 I am just concerned as to the background behind that as to  
11 why Namco was not named. And I would just like for my  
12 satisfaction to know why. And this is my reasoning for the  
13 question. I think it's relevant and I think it's important  
14 to the Complainant's case.

15 MR. KINNEY: Your Honor, may I also make one  
16 point for relevance? We have alleged in our statement that  
17 Midway did not comply with the statutory requirements of  
18 registering the assignment, and that's the wording of the,  
19 or the document that transfers ownership, which is --

20 JUDGE MATHIAS: I'll allow the question. Maybe  
21 now that you have stated the grounds of relevance, it may  
22 focus it. I think before we were floundering. I don't  
23 think the focus of your questions were very clear. But I  
24 will allow the question.

25 Do you recall it or would you like to restate it?

1 THE WITNESS: I recall several responses.

2 JUDGE MATHIAS: All right.

3 THE WITNESS: Number one, if you consult the  
4 statute in the regulations, you will find that what's  
5 required by the statute in the regulations to --

6 BY MR. BAILEY:

7 Q Let me -- can you answer my question, please?  
8 Were you aware that these documents existed?

9 A Yes.

10 Q Okay.

11 A I had not seen them.

12 Q You had not seen them. You had never -- you did  
13 not have them in your possession?

14 A I did not have them in my possession. I was aware  
15 that they existed.

16 Q When did you become aware of their existence?

17 A At the time of the first PA application for the  
18 Galaxian was being prepared. The comment that I would like  
19 to make that's --

20 Q There is no question about the comment that you  
21 would like to make.

22 MR. PLAIA: Your Honor, he's --

23 JUDGE MATHIAS: There is no question pending. I  
24 am sure, Mr. Larson, you will have an opportunity to answer.  
25 I will allow Mr. Plaia to ask you another question or to,

1 if necessary, but let's proceed. This examination is going  
2 relatively slowly as it is. Let's get the questions out  
3 and answered and get on with it.

4 BY MR. BAILEY:

5 Q With respect to the first publica -- with respect  
6 to Rally-X, strike that.

7 Did you have -- were you aware of the documents,  
8 the license agreement and the existing -- let me, to make  
9 sure that you -- to just clarify for the record, you testified  
10 that you had never seen the license agreement?

11 A That's correct, I have not seen it to this date.

12 Q Okay.

13 MR. PLAIA: Are we talking about Pac-Man or  
14 Galaxian?

15 MR. BAILEY: Okay, I am talking about Rally-X  
16 now.

17 MR. PLAIA: Oh, Rally-X.

18 BY MR. BAILEY:

19 Q Had you seen the license agreement or the accompany-  
20 ing documents for Rally-X?

21 A No.

22 Q Were you aware of their existence?

23 A Yes.

24 Q Okay. With respect to -- you testified that you  
25 were aware of a first publication in Japan?

1 A. Yes.

2 Q With respect to Pac-Man?

3 A The circumstances, again, I feel publication is  
4 in the form of almost a legal conclusion.

5 Q Yes.

6 A The circumstances that underlied that conclusion,  
7 the license, the same, whatever you will, conveyance, I was  
8 aware of, yes, that it had transpired.

9 Q That the publication took place in Japan?

10 A That was the reason for stating the publications  
11 in Japan as I understood it, yes.

12 Q Had you had an opportunity to see those publications  
13 in Japan?

14 A What publications?

15 Q Of the Pac-Man.

16 A Opportunity to see them.

17 Q Had you seen them in Japan?

18 A Of the audio visual work?

19 Q Yes.

20 A No.

21 Q Rally-X?

22 A No.

23 Q Okay. In your -- had you made, in your deposit  
24 of the video tape for Pac-Man, what efforts, or what did  
25 you do to determine that there were no copyrightable

1 differences between the first publication in Japan of  
2 Rally-X and Pac-Man with respect to the deposited tapes?

3 A Well, I think, you know, in view of my answer to  
4 your previous question, a simple answer is I wasn't aware  
5 there were any differences.

6 Q I see. Had you asked if there were any differences  
7 or, --

8 A I stated that I wasn't -- I had not seen these  
9 previous publications. You know, whatever differences there  
10 may have been -- no, I simply wasn't informed of it. It was  
11 discussed, I mean I am simply without any knowledge concerning  
12 what you are asking me about.

13 Q Did you, to your knowledge, did you ever submit  
14 anything to the Copyright Office stating that there were  
15 no copyrightable differences between the tape deposited and  
16 the publication that took place in Japan with respect to  
17 the Pac-Man and Rally-X games?

18 A Repeat your question again.

19 Q Did you submit any written notice or make any  
20 verbal statement to the Copyright Office with respect to  
21 there being no copyrightable differences between the first  
22 publication in Japan of the Pac-Man and Rally-X games in  
23 comparison to the tapes that were, the video tapes that you  
24 deposited?

25 A No, if I understand your question correctly. That

1 I had made no representations to the Copyright Office con-  
2 cerning any differences that may have existed between the  
3 first publication in Japan and the video tape that was  
4 deposited.

5 Q Mr. Albee, Mr. Albee, what is his position at the  
6 Copyright Office?

7 A Well, I believe he's the chief of the examiners  
8 in the performing arts group.

9 Q In the performing arts group?

10 A Yes.

11 Q Which group was the application handled by?

12 A Performing arts.

13 Q Performing arts. Each of these?

14 A That's what the PA indicates, yes.

15 Q I see. Why was Mr. Dietz consulted?

16 A Because when I presented the problem, as I described  
17 it, my suggested solution for your discussion was to consider  
18 the thing as being a visual arts work based on the analogy  
19 to a board game. And Mr. Dietz, who is an examiner in the  
20 visual arts group, was called for the purpose of discussing  
21 that.

22 Q I see. Had you for Midway ever attempted to  
23 register any software of the Pac-Man or Rally-X or Galaxian  
24 games?

25 A No.

1 Q Are you aware of any registration for copyright  
2 of such software?

3 A No.

4 Q Any of the hardware?

5 A Copyright on the hardware?

6 Q Yes.

7 A Well, I don't know. I suppose that, you know,  
8 we had discussed in the first -- my first discussion with  
9 Dave Albee the video tape does show the housing of the  
10 arcade game. And following, carrying Mr. Albee's analogy  
11 to the coreographic work and the protection of the set shown  
12 in the video take of a coreograph work, the hardware in terms  
13 of the design of the arcade game housing and art work that  
14 might appear on the arcade game housing.

15 Q When I speak of the hardware I am speaking of things  
16 like the ROM, things of that nature.

17 A It was understood by me from the outset that there  
18 was no way that any work of art in the ROM as opposed to  
19 the ROM being a copy, for example, was simply any claim of  
20 that sort simply would not be registered. There would be  
21 no way to get a claim of that sort registered without  
22 bringing action against the register of copyrights in the  
23 District Court.

24 Q I see. Thank you.

25 MR. BAILEY: Your Honor, I have no further questions.

1 JUDGE MATHIAS: Mr. Kinney.

2 MR. KINNEY: I have just a couple.

3 REDIRECT EXAMINATION

4 BY MR. KINNEY:

5 Q You stated, I believe, you represented to Mr.  
6 Albee that the machine did not contain, or that you --  
7 software at this initial meeting on February 26th, is that  
8 correct?

9 A Yes, I stated that, as I understood it, the machine,  
10 the images that we were talking about were being generated  
11 sort of by hard-wired equipment.

12 Q Did you ever correct that information or that  
13 impression that you gave to Mr. Albee?

14 MR. PLAIA: I would object to that, Your Honor,  
15 because I think there is no foundation for it. He is  
16 assuming that --

17 JUDGE MATHIAS: I'll overrule the objection. I  
18 think the record gives some ground for assumption that it  
19 wasn't hard-wired. I think we had that long discussion of  
20 that Mr. Basurb(ph) on the stand.

21 THE WITNESS: It became -- the question of whether  
22 it was hard-wired or whether there was software or not in  
23 the context of our discussion was unimportant other than  
24 to a preliminary basis in that what we were, we were not  
25 seeking protection in a computer program. We were not seeking

1 protection in the ROM, again, speaking as works of art as  
2 opposed to any copies or anything like that. We were talking  
3 about what appeared on the screen and your question assumes  
4 that there was something incorrect conveyed by me to the  
5 Copyright Office, presumably that was relevant or material  
6 to the application or proposed application that we were  
7 discussion. And I do not necessa -- I'm not agreeing with  
8 you that there was anything to correct.

9 BY MR. KINNEY:

10 Q I believe your answer in sum would be that you  
11 did not inform Mr. Albee that the machines depicted did  
12 involve ROM's and have software, is that correct?

13 A That's right, I was not specifically aware of the,  
14 that there was software involved and it made no, if Mr.  
15 Albee had inquired as to the details of how the machine was  
16 operated, I would have had to consult with Mr. Cohen or  
17 other members of the firm in Chicago. And I never represented  
18 to Mr. Albee that I was an expert or had detailed knowledge  
19 of how the machine operated.

20 Q But you did represent to him that these machines  
21 were hard-wired?

22 A I said that, as I understood it, that these  
23 images were being generated by hard-wired equipment.

24 Q And you never told him anything different in the  
25 course of all of these dealings on these PA 59-977 thru

1 PA 88-049 Rally-X?

2 A. The topic never came up, no.

3 MR. KINNEY: That's all.

4 JUDGE MATHIAS: Mr. Plaia, I'll allow limited  
5 recross.

6 MR. PLAIA: One second.

7 (Pause)

8 MR. PLAIA: Your Honor, I have no recross.

9 JUDGE MATHIAS: Thank you very much, Mr. --

10 MR. BAILEY: I may have some recross. I just have  
11 one question.

12 JUDGE MATHIAS: All right, I will allow one more  
13 question. Go ahead.

14 RECROSS-EXAMINATION

15 BY MR. BAILEY:

16 Q Mr. Larson, did you make any oral or written  
17 representations to the Copyright Office about the existence  
18 of the license between Namco and Midway? }

19 A. Yes.

20 Q What form was it? Was it written or oral?

21 A. It was oral. It was in connection with the  
22 Galaxian thing and it was during the meeting I referred to  
23 on February 26. That the machine had been, or that this  
24 video game, if you will, had been designed in Japan and,  
25 you know, I really didn't have too much to say about it

1 because obviously I didn't know too much about it.

2 Q Did you talk to him about the license or the --  
3 did you make representations to him about the license?

4 A No.

5 Q With respect to Pac-Man and Rally-X.

6 A I am trying to recollect the conversations. It  
7 probably would have come up in connection with the review  
8 by the assignments submitted by the official from the  
9 Assignments and Document Section of the Copyright Office  
10 and the request for special relief procedures. No, I don't  
11 recall anything.

12 MR. BAILEY: Thank you. No further questions.

13 JUDGE MATHIAS: Does that give rise to any further  
14 questions?

15 All right, thank you very much, Mr. Larson. You  
16 are excused.

17 (The witness was thereupon excused.)

18 JUDGE MATHIAS: I would propose to proceed until  
19 a quarter to one and then we will take a 45-minute lunch  
20 break if that's alright with everybody.

21 MR. KINNEY: I believe the copyright people are  
22 coming in at 1:30.

23 JUDGE MATHIAS: 1:30. That would give you 45  
24 minutes for lunch.

25 MR. KINNEY: I would then like to call Mr. Huang.

JUDGE MATHIAS: All right, would Mr. Huang please take the stand.

(Pause)

MR. KINNEY: Your Honor, I will be trying to introduce a reference or a document -- since we have to file the documents identification September replay issue and I would like to point out I put them on the desk.

JUDGE MATHIAS: Mr. Huang, would you please take the stand?

Whereupon,

SHIH-MING HUANG

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE MATHIAS: You may proceed, Mr. Kinney.

DIRECT EXAMINATION

BY MR. KINNEY:

Q Would you state your name for the record?

A My first name S-H-I-H - M-I-N-G. Last name, H-U A N G.

Q And by whom are you employed?

A I am employed by Artic International, Incorporated.

Q And what is your job title at Artic?

A I am the President of Artic, Incorporated.

Q Do you have any technical degrees?

A I have got the electronic engineering degree.

Acme Reporting Company

Eb-30

1 Q From what institution and when?

2 A National Chioa-Tung University in Taiwan. That's  
3 1972.

4 Q Now, since your deposition is on file in this  
5 case, I will not go further into your background except to  
6 ask you if you have sufficient background in electronics  
7 and computer games to consider yourself an expert in those  
8 games?

9 A Please repeat.

10 Q Do you consider yourself an expert in electronics  
11 and computer game machines?

12 MR. PLAIA: I would object to that, Your Honor.

13 JUDGE MATHIAS: Well, maybe we can shortcut this.

14 I assume that in the deposition there is quite a bit about  
15 his background, is there? Mr. Kinney is attempting to  
16 qualify him now as an expert. If he will present him as  
17 an expert on the basis of the deposition, maybe we can  
18 avoid all of this if there is no --

19 MR. PLAIA: Yes, I don't remember a whole lot more  
20 than his educational background being developed during the  
21 deposition. The deposition, incidentally, was admitted  
22 yesterday as 142.

23 JUDGE MATHIAS: Yes, I know, but I haven't read  
24 it and I assume that you all have. And I am asking if on  
25 the basis of that deposition you will object to Mr. Kinney

b-31

1 presenting Mr. Huang as an expert.

2 MR. PLAIA: Your Honor, I am looking through the  
3 first pages of this deposition and I don't believe that  
4 the testimony establishes him as being an expert in the  
5 field -- a technical expert in the field.

6 JUDGE MATHIAS: Mr. Kinney, if you recall the  
7 sections of the deposition that might qualify him as an  
8 expert. I do not believe the proper way to qualify the  
9 witness as an expert is to ask him if he believes he is an  
10 expert.

11 MR. KINNEY: All right.

12 JUDGE MATHIAS: If it isn't established in the  
13 deposition and you want him established as an expert, I  
14 suggest that you are going to have to go through the usual  
15 procedures, at least minimally, but if you can find it in  
16 the deposition and refer it to counsel in a hurry, maybe  
17 we can shortcut it.

18 MR. KINNEY: Well, I will try and do that at the  
19 noon break, Your Honor. We will get into direct testimony  
20 of what this witness knows now.

21 JUDGE MATHIAS: All right, you may proceed.

22 Do you have something to add, Mr. Bailey? Is  
23 there something in the record that you want to --

24 MR. BAILEY: No, I was going to suggest maybe  
25 voir dire by Mr. Plaia in terms of determining --

1 JUDGE MATHIAS: Well, I think that at least Mr.  
2 Kinney has to establish the basic qualifications on the  
3 record and then maybe there wouldn't be any need for voir  
4 dire. But let's proceed. I think Mr. Kinney knows what  
5 he is going to do now.

6 BY MR. KINNEY:

7 Q Mr. Huang, do you know of any licensees of Namco  
8 Corporation for the Pac-Man or Rally-X games?

9 A You mean to the company in the whole world?

10 Q Yes.

11 A Yes, I do know some companies.

12 Q Would you name those that you recall?

13 A Besides Midway, there is a company in Taiwan  
14 called Honley Electronics. They got the license from  
15 Namco.

16 MR. PLAIA: What's the name of it?

17 THE WITNESS: Honly, H-O-N-L-Y.

18 BY MR. KINNEY:

19 Q How do you know that?

20 A I talked with the President, Mr. Lu.

21 MR. PLAIA: Object, Your Honor, on the hearsay  
22 grounds.

23 THE WITNESS: And he told me --

24 JUDGE MATHIAS: One second. I will allow him to  
25 finish the question. I may entertain a motion to strike

1 if there is not an adequate foundation.

2 All right, you may proceed with what he told you,  
3 Mr. Huang.

4 THE WITNESS: When last year I visited his  
5 factory and I bought some boards from them and he told me  
6 he got the license from Namco to produce the Pac-Man and  
7 Rally-X game.

8 THE WITNESS: I would move to strike that, Your  
9 Honor, because that certainly doesn't -- that's hearsay.

10 JUDGE MATHIAS: I am going to allow Mr. Kinney  
11 to, if he can, to establish the circumstances of this  
12 conversation to see if there is any degree of reliability.  
13 As you know, in administrative proceedings the hearsay rule,  
14 per se, does not apply and the real question is whether or  
15 not I can find any reliability in the circumstances surround  
16 ing the hearsay statements.

17 Certainly the hearsay objection is still a founda-  
18 tion stone on which you can make an objection if the statement  
19 is just not reliable. But I will have to hear the circum-  
20 stances to determine whether or not it was under such  
21 circumstances as I might consider it to be a reliable  
22 hearsay. There is a reliable hearsay rule in administrative  
23 proceedings. You may proceed, Mr. Kinney.

24 BY MR. KINNEY:

25 Q Did you ever meet Mr. Honly in the presence, in

1 the company of officials of Namco Corporation?

2 A. Pardon?

3 Q. Did you ever meet Mr. Honly --

4 JUDGE MATHIAS: It's Mr. Lu I believe.

5 BY MR. KINNEY:

6 Q. I'm sorry. Mr. Lu in the presence of officials  
7 of Namco Corporation?

8 A. You mean do I met -- did I meet him with some  
9 officials of Namco?

10 Q. Yes.

11 A. Yes, I did.

12 Q. And when was that?

13 A. It was the mid this year in Japan, in Tokyo  
14 Shinjuku-ku.

15 MR. BAILEY: Excuse me, when did he say that was?

16 THE WITNESS: In Tokyo Shinjuku-ku. Shinjuku-  
17 ku is like a --

18 MR. BAILEY: But when?

19 THE WITNESS: Mid of this year.

20 JUDGE MATHIAS: Middle part of 1981?

21 THE WITNESS: Yes.

22 BY MR. KINNEY:

23 Q. At that time did Mr. Lu introduce you to these  
24 officials of Namco?

25 A. Actually he -- we are in the same club and he

1 set beside me and he told me those are the stuff exported  
2 in manager from Namco and I said oh, yes. That's it, and  
3 that's the situation at that time.

4 Q At the Honly Company plant in Taiwan, did you see  
5 any Rally-X or Pac-Man games?

6 A You mean when I vist there?

7 Q Yes.

8 A Did I see any game over there?

9 Q Yes.

10 A Yes, I do, I did.

11 Q Did those games bear any copyright notice on them?

12 A When I saw the complete game I didn't see any  
13 copyright notice on the screen. Just the name Honly on the  
14 screen.

15 Q Did the machines or the display on the screen  
16 include the word "Namco"?

17 A No. I didn't see the Namco on the screen.

18 Q What else led you to believe that Honly is  
19 licensed by Namco?

20 MR. PLAIA: Your Honor, can I make an objection.  
21

22 JUDGE MATHIAS: Well, you can make a couple of  
23 objections. You can make an objection to that question as  
24 not having a proper foundation and I assume that's --  
25 what else?

MR. PLAIA: I have another objection, too. And

1 that is the relevancy of this line of questioning. To show  
2 whether some company in Taiwan is a licensee of Namco is  
3 not the issue in this case. The issue is --

4 JUDGE MATHIAS: Well, I will ask Mr. Kinney to  
5 tell us the relevancy of this entire line of questions.

6 MR. KINNEY: The Copyright Act provides that all  
7 copies of the work published by or under the authority of  
8 the latest author bear a copyright notice. I am attempting  
9 to show that a licensee at Namco publishing -- by selling  
10 machines, that can be publication. By selling -- is selling  
11 machine without a copyright notice by and under the authority  
12 of the alleged copyright owner, or originator.

13 JUDGE MATHIAS: Well, I think you are getting  
14 beyond, and I didn't realize the basis for your earlier  
15 questions about whether a copyright notice appeared on these  
16 machines. You haven't established yet that Honly is a  
17 licensee of Namco. Certainly anything that's been said up  
18 to this point is not reliable evidence to that effect. I  
19 told you I would allow you to qualify that, but it seems  
20 to me you have gone further.

21 I will strike the portions of the testimony con-  
22 cerning the appearance of a copyright mark on the machines  
23 until you have established with at least a minimal reliability  
24 that Honly is a licensee of Namco.  
25

b-37

1 BY MR. KINNEY:

2 Q Outside of the President of Honly's statement to  
3 you, do you have any other indication that Honly was  
4 licensed by Namco?

5 A He showed me the custom chips that -- by Namco,  
6 and he said he paid about 20,000 yen per set. That's two  
7 pieces for Pac-Man and he say anybody license by Namco can  
8 get these two chips. And besides the price of the chips,  
9 he need to pay extra 20,000 yen for a game.

10 So, I considered that part of the licensing fee.

11 Q In your knowledge of this industry, are custom  
12 chips made exclusively for one source?

13 MR. PLAIA: I am going to object to that, Your  
14 Honor. There is absolutely no foundation that he has any  
15 background to be answering that question.

16 MR. KINNEY: There is considerable background in  
17 the deposition, Your Honor, that Mr. Huang started Artic  
18 International in selling integrated circuits, or chips. And  
19 the Artic does to this day sell integrated circuits, or  
20 chips.

21 If you like, I will -- I believe Mr. Plaia knows  
22 that.

23 MR. PLAIA: I will agree that during his deposition  
24 I remember I took the deposition, that he said that he was  
25 a chief executive officer and that he purchased boards in

1 Asia and I don't think he said a whole lot more. He  
2 certainly didn't talk about having extensive operations as  
3 far as licenses with foreign companies. As a matter of fact,  
4 he disclaimed knowledge about licensing and that type of  
5 information in dealing between companies.

6 JUDGE MATHIAS: Well, I'm not going to read the  
7 entire deposition at this point. Mr. Kinney, maybe you could  
8 review some of that testimony and qualify the witness again.  
9 I'm sorry, but since there seems to be some disagreement  
10 on the content of the --

11 BY MR. KINNEY:

12 Q Mr. Huang, how long have you dealt with integrated  
13 circuits?

14 A About four years.

15 Q How many years?

16 A Four.

17 Q Four years. What do you do with integrated circuits?

18 A We export and import and also do the wholesale  
19 in the United States, about -- we carry very big line, many  
20 items, including many -- and some digital, some get some  
21 memories and some CPU's.

22 Q Does Artic buy integrated circuits in the United  
23 States and stock them?

24 A You mean keep inventory?

25 Q Yes.

1 A. We do have inventory of stock.

2 Q And you stock a large number of integrated circuits?  
3 Different kinds of integrated circuits?

4 A. Yes, we have about probably between quarter  
5 million pieces to half million pieces in stock.

6 MR. PLAIA: Your Honor, I realize this is taking  
7 a long time. I am going to continue to object because the  
8 question, we will think back, is what does he know about  
9 custom's chips and does he deal with companies on custom  
10 chips. Why don't we ask him that and we'll know whether he  
11 can answer it?

12 JUDGE MATHIAS: Well, I hope that Mr. Kinney is  
13 going to get around to that. I will let him qualify the  
14 witness.

15 MR. KINNEY: Now, I am trying to qualify the  
16 witness as an expert in the integrated circuit, or knowledge-  
17 able in the integrated circuit market. A custom chip is,  
18 as Mr. Plaia knows, an integrated circuit.

19 BY MR. KINNEY:

20 Q Now, Mr. Huang, do you know what is a custom chip?

21 A. Usually a custom chips is a special design for  
22 certain purpose. They have different function, usually they  
23 do have different function or different -- compare with the  
24 existing parts.

25 Q Is a masked ROM such a chip?

fb-40

end #5

#6

1 A Usually according to my knowledge, you can make  
2 any chips, integrated circuit chips, as long as the  
3 function and the package is different from the existing  
4 mark or existing package. Then you can call that is  
5 custom chips. If you don't buy the clothes from the  
6 clothes shop, order somebody direct to do for you, we mean  
7 the same meaning.

8 Q Have you seen the Namco Boards that were made  
9 exhibits here?

10 A I didn't look at carefully, but I do see it  
11 roughly.

12 Q Do those boards contain custom chips?

13 A I think they do have custom chips on it.

14 Q Is it conventional in the IC market to sell custom  
15 chips to anyone except the orderer of those chips, the  
16 one that is made custom for?

17 A Usually it is impossible unless the customer that  
18 ordered the parts, they can get it from the source directly  
19 only.

20 Q And you saw custom chips at the Honly Corporation  
21 that were used in making Pac-Man and Rally-X games, is that  
22 correct?

23 MR. PLAIA: I am going to object. I think that's,  
24 while leading will speed things along, I think I would  
25 like to hear Mr. Huang's testimony a bit more on what he

1 saw.

2 JUDGE MATHIAS: All right. I don't believe he  
3 used the term "custom chips" for those two games previously.  
4 I do believe that in sensitive areas such as this, Mr.  
5 Kinney, you should avoid leading the witness. Please rephrase  
6 your question.

7 BY MR. KINNEY:

8 Q Were you told any -- did you see custom chips at  
9 the Honly Corporation?

10 A Yes. According to my knowledge, because when  
11 Pac-Man and Rally-X just on market last year, the most  
12 hard part is to make the custom chips. So, we are in the  
13 IC business and so many of my friend in Japan, they are  
14 making about these five pieces of custom chips that to  
15 belong to Pac-Man and three belong to the Rally-X. And  
16 finally, they said they made a sample to substitute the  
17 custom chips. So what the board that we import is without  
18 a custom chip but with the sample only.

19 And I do, I did see the custom chips in Honly's  
20 factory. So that make me believe that he got a license from  
21 Namco.

22 MR. PLAIA: I'm going to object and ask that that  
23 answer concerning the license be stricken. I don't think  
24 after all this time we have established that he can say that,  
25 he has a basis for it.

1 JUDGE MATHIAS: Well, I'm not going to strike it  
2 yet. I would like to know how he could recognize it as a  
3 Namco custom chip.

4 BY MR. KINNEY:

5 Q How can you recognize it as a Namco custom chip?

6 A At that time these two games nobody said that they  
7 got custom chip as, except that Namco, so that make me  
8 believe that's Namco's chip. But I didn't see any sign on  
9 it.

10 Q Could you have bought, are you familiar with the  
11 market for IC chips sufficient to say that at that time that  
12 such custom chips were not available on the marketplace for  
13 purchase?

14 JUDGE MATHIAS: I'm not going to allow the answer  
15 to that question until you qualify him, Mr. Kinney. First  
16 of all, we don't know what date this was that he supposedly  
17 saw this. You are going to have to establish a far greater  
18 foundation that you have in order to ask that particular  
19 question.

20 I am sorry we are going to have to go through the  
21 time but I am not going to allow you to ask improper  
22 questions. No matter how much time it takes we are going  
23 to have to go through the qualifying stages. That's the  
24 only way this can be done properly.

25 MR. KINNEY: Okay. I may want to come back to

1 this area, Your Honor, but in view of the short time I will  
2 go on to other areas.

3 BY MR. KINNEY:

4 Q Does Artic International sell full game machines?

5 A To the best of my knowledge, we just sell the  
6 components.

7 Q Are those components used, or can those components  
8 be used in repairing existing game machines?

9 A Yes, they do.

10 Q With respect to the printed circuit boards for  
11 Pac-Man, or Puck-Man, can that that Artic sold, could that  
12 be -- board be used to repair an existing game, Puck-Man  
13 game machine?

14 A If you do have sufficient electronic knowledge  
15 to make the wiring harness to fit, it is.

16 Q Does Artic export game printed circuit boards  
17 out of the United States?

18 A Yes, we do.

19 Q Has Artic exported printed circuit boards that  
20 could make a Puck-Man game out of the United States?

21 A Yes, we did.

22 Q Has Artic exported printed circuit boards that  
23 could make a Rally-X game outside of the United States?

24 A Yes, we did.

25 Q Do you know of any Namco made Puck-Man games, or

fb-44

1 games, that have been imported into the United States?

2 MR. PLAIA: Objection, Your Honor. I think that's  
3 out of the clear blue sky. I don't know where there is a  
4 foundation that he would have knowledge of that.

5 JUDGE MATHIAS: Well, I don't know either. He  
6 was just asked if he knows. Objection overruled.

7 THE WITNESS: Yes, I know.

8 BY MR. KINNEY:

9 Q Do you know of a Namco-made Rally-X game that  
10 has been imported into the United States?

11 A Yes, I know.

12 Q Have you seen Namco ads for Pac-Man and Rally-X  
13 in United States publications?

14 A Yes, I did.

15 (Pause)

16 MR. KINNEY: I would like to have a two sheets  
17 of paper that are purport to be a copy of the first page  
18 and an interior page of "Replay Magazine" issue of  
19 September 1981, marked as an exhibit.

20 JUDGE MATHIAS: What will it be marked? RX, what,  
21 sir?

22 MR. KINNEY: Twenty-four.

23 JUDGE MATHIAS: All right, it may be marked  
24 RX-24 for identification.  
25

(The document referred to was  
marked for identification as  
Respondent's Exhibit No. RX-24.)

BY MR. KINNEY:

Q Mr. Lee, is RX-24 an accurate copy from the  
"Replay Magazine", from a "Replay Magazine" that you have  
read or seen?

A You mean Mr. Huang?

Q Mr. Huang. I'm sorry.

A Pardon me? Please repeat once more.

Q Is the two pages that you have there, RX-24,  
an accurate copy of a magazine that you have seen?

A You mean is this the copy from the magazine,  
"Replay"?

Q Yes.

A Yes, it's the copy from the September 1981 "Replay  
Magazine." RX-24.

Q Would you tell me what the second page is?

A The second page is the advertisement from Namco,  
Limited and Namco-America, Inc. and it is the advertisement  
for the Pac-Man, Galaxian, Rally-X, Tank Battalion,  
King of Ballons(ph), and on it you can see, you ask for it,  
you will get it from Namco.

MR. KINNEY: Your Honor, I would like to move this

1 into evidence.

2 JUDGE MATHIAS: Is there any objection?

3 MR. PLAIA: Yes, there is.

4 JUDGE MATHIAS: What's the objection?

5 MR. PLAIA: My objection is as to as to relevancy  
6 because this is an image ad published in, if you will notice,  
7 'this is not a magazine, it's a directory and it's of the  
8 International Coin Operated Entertainment Industry, and I  
9 don't -- if it's being offered to show something that's  
10 happening in the United States, I don't think it shows that.

11 MR. KINNEY: Your Honor, that ad uses the  
12 word "Pac-Man," P-A-C M-A-N, which is asserted here to be  
13 Midway's and only Midway's trademark. Yet we find an ad  
14 by Namco and also, I believe, that a Pac-Man is only used  
15 in the United States. Namco uses Puck-Man, P-U-C-K M-A-N.

16 JUDGE MATHIAS: I will let it in for what it's  
17 worth. It doesn't necessarily show that Namco has been  
18 exporting games to the United States and so far we have no  
19 information on the record of "Replay Magazine," its purpose.  
20 So I don't know just what it proves, but I will receive  
21 RX-24 in evidence.

22  
23 (The document referred to, having  
24 been previously marked for identi-  
25 fication as Respondent's Exhibit  
No. RX-24, was received in evidence.)

fb-47

1 MR. KINNEY: I believe "Replay Magazine" was  
2 referred to in Mr. Jarocki's testimony as, and we have  
3 exhibits by Complainant from "Replay Magazine."

4 JUDGE MATHIAS: As a trade magazine, but I don't --

5 MR. PLAIA: This is not a magazine. This is a  
6 directory. This is the directory and it says right on it,  
7 "Directory." It's not a magazine.

8 BY MR. KINNEY:

9 Q Mr. Huang, --

10 JUDGE MATHIAS: May I see the exhibit?

11 MR. PLAIA: Your Honor, this is a director, it's  
12 not a magazine.

13 THE WITNESS: That directory is included in this  
14 issue. I think that's the --

15 BY MR. KINNEY:

16 Q Mr. Huang, did you receive that magazine at your  
17 office, or that publication at your office of Artic Inter-  
18 national as part of your subscription to "Replay Magazine"?

19 A Yes, we did receive.

20 JUDGE MATHIAS: All right, RX-24 is received.

21 MR. KINNEY: Thank you.

22 MR. BAILEY: Your Honor, may I see the --

23 JUDGE MATHIAS: Yes, you may, as soon as I have  
24 looked at it.

25 (Pause)

fb-18

1 BY MR. KINNEY:

2 Q Did you attend the JA Show in 1980?

3 A Yes, I did.

4 Q At that show did you see a copy of CPX-26, which  
5 I had you to review?

6 A Yes, I remember I saw it.

7 Q Was that CPX-26 brochures being handed out at that  
8 show to passer-bys and then generally distributed?

9 A Yes, to the customers that attended show and they  
10 asked for those brochures.

11 Q Were there a large number of these brochures.  
12 distributed?

13 A I think at that time probably at least thousands.

14 Q Thank you. I would ask you to look at this  
15 brochure and tell me if it bears any copyright notice.

16 (Pause)

17 THE WITNESS: I didn't see any copyright notice  
18 on this.

19 JUDGE MATHIAS: Is this a convenient time to take  
20 a luncheon break, Mr. Kinney?

21 MR. KINNEY: Yes.

22 MR. BAILEY: Your Honor, if I may, I didn't have  
23 an opportunity to state whether I objected or not on the  
24 entry of --

25 JUDGE MATHIAS: RX-24?

fb-49

1 MR. BAILEY: Yes. I might suggest -- I don't  
2 have any objections, but I might suggest that the magazine  
3 itself be submitted as evidence as well to show, you know,  
4 where -- I think it has some other probative value as to  
5 exactly what it is.

6 MR. PLAIA: I would inquire as to what value it  
7 has.

8 JUDGE MATHIAS: I assume what Mr. Bailey is  
9 stating that it's more apparent, the nature of the magazine  
10 is more apparent or the nature of the director if the whole  
11 things is in. Is that your point, Mr. Bailey?

12 MR. BAILEY: Yes, that's my point.

13 JUDGE MATHIAS: Do you have any objection to  
14 putting the entire magazine in rather than the excerpt?

15 MR. KINNEY: No, Your Honor, provided we can borrow  
16 it back for th hearing next week.

17 JUDGE MATHIAS: All right, I assume the same  
18 arrangements can be made with you as can be made for  
19 Complainant with their exhibits.

20 MR. KINNEY: Shall we make that the same number?

21 MR. PLAIA: Your Honor, before we leave the record,  
22 Mr. Huang testified as to, that he thought this brochure  
23 was handed out to thousands of people and he answered that  
24 before I had a chance to register an objection to that.  
25 And I don't think that' it's established how he could possibly

fb-50

1 know how many people received it.

2 JUDGE MATHIAS: I'll take that as his estimate  
3 and I am not going to strike it. He was at the show.

4 All right, we will break for lunch. Oh, before  
5 we do I will, as I say, receive the entire book, what is  
6 it called? "Replay Magazine" as the September directory  
7 in evidence as RX-24 and I will allow Mr. Kinney to use it  
8 next week.

9 MR. PLAIA: Can I ask one thing? Would it be  
10 alright, Mr. Kinney, if we were to start packing up this  
11 equipment now?

12 JUDGE MATHIAS: We will go off the record and you  
13 can discuss it.

14 (Whereupon, at 12:46 o'clock p.m., the hearing  
15 was recessed, to reconvene at 1:30 o'clock p.m.  
16 this same day, Friday, September 25, 1981.)  
17  
18  
19  
20  
21  
22  
23  
24  
25

AFTERNOON SESSION

1:39 p.m.

JUDGE MATHIAS: Back on the record. Mr. Kinney, I believe you want to interrupt Mr. Huang's testimony now?

MR. KINNEY: Yes, and call Ms. Peters.

JUDGE MATHIAS: Ms. Peters, would you please take the stand?

Whereupon,

MARY BETH PETERS-GINGERY

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KINNEY:

Q Would you state your name for the record, please?

A Mary Elizabeth Peters-Gingery, also known as Mary Beth Peters. My married name is G-I-N-G-E-R-Y.

Q And for whom do you work and what is your title?

A I work for the Library of Congress, Copyright Office. My present title is Chief of the Examining Division.

Q How long have you been Chief of the Examining Division?

A Since the end of April of 1980.

Q Prior to that, did you work for the Copyright Office?

A Yes, I did.

Q And what was your title?

Acme Reporting Company

12021 628-4888

b-52

1 A. Chief of the Information and Reference Division.

2 Q How many -- would you give us some background  
3 information on the Copyright Office? For instance, how  
4 many applications to register claims for the copyrighter  
5 filed in any convenient period of time?

6 A We actually don't have a good count on how many  
7 come in. We do know that in fiscal year 1980, we registered  
8 469,000. We also rejected approximately 5,000 applications  
9 and we have at least -- we write on 25 percent of the  
10 applications that come in and 25 percent of that 25 percent  
11 are no replies. In other words, we never hear from them  
12 so we take no action.

13 Q How many examiners are there in the Copyright Office?

14 A Okay. The way we are broken down, we are broken  
15 down into examiners, senior examiners and supervisory  
16 examiners. The examiners do the day-to-day examination of  
17 the claims and there are approximately 50 examiners.

18 Q My quick arithmetic says that that amounts to }  
19 about 10,000 applications per examiner per year.

20 A That may be approximately -- the way we -- it  
21 depends on the section and it depends on the type of material  
22 that you are examining. If you are examining music, you  
23 examine approximately 60 claims per day. If you examine  
24 literary material, it's approximately 40 claims per day and  
25 that's the way we do.

jfb-53

1 Q Are you familiar with the process of handling  
2 PA applications, performing art applications?

3 A Yes, I am.

4 Q Would you briefly outline that process?

5 A Could you make it more clear? Are you talking  
6 about how they come in and what they do?

7 Q Well, for instance, a performing arts application  
8 would be used for a motion picture, would it not?

9 A It would be used for music, motion pictures,  
10 dramas, coreography, pantamines, audio-visual works,  
11 narrations, sermons, it's used for a lot of things.

12 Q Let's take a typical motion picture application.

13 A Right.

14 Q How is that handled in the normal course in the  
15 Copyright Office?

16 A We have a team that handles motion pictures.  
17 Motion pictures, as motion pictures as a part from audio  
18 visual works, are very lengthy to examine because at least  
19 the feature films are 35 millimeter films with approximately  
20 six cans. And we have special equipment in order to  
21 examine them.

22 But normally what would happen is a technician  
23 would go through the material and actually look at least  
24 the beginning of the film, the end of the film, the credits,  
25 the notice. They would actually write down where the notice

fb-54

1 was and what was exactly in the notice. They would also  
2 then copy the credits off, the running time, the medium.

3 That would then be given to an examiner who would  
4 look at the application with the data sheet that had been  
5 presented. If there were any problems, it would be the  
6 examiner who would write to clarify, or call to clarify  
7 the matter.

8 And at that point it would either be registered  
9 or we would, you know, put it into correspondence.

10 Q Assuming the examiner handling a particular  
11 application approves the application, what is the process  
12 towards issuing the certificate?

13 A After it goes out, it leaves the Examining Division  
14 at that point in time and it goes to a numbering desk that  
15 assigns a particular number to that. If it's a motion  
16 picture, it would be assigned a PA number. It's an individual  
17 identifier.

18 After that happens, it goes to a unit that  
19 prepares the certificate and at that point the certificate  
20 gets mailed out.

21 Q Is that largely an automatic clerical process?  
22 A Yes.

23 Q Yes. Does the Copyright Office grant copyrights  
24 on, or grant claims to copyrights on games?

25 A The way you phrased the question it's difficult

b-55

1 to answer. The Copyright Office doesn't grant anything.  
2 Where there is a what we see at least as a prima facie  
3 valid claim, we will register the claim.

4 If you are talking about games, games per se,  
5 are not within the subject matter of copyright, but certain  
6 aspects of games are. The literary material that may be  
7 the instructions to the game, audio -- if you want to talk  
8 about electronic video game, the graphic --

9 Q We haven't got that far yet.

10 A Okay. We will register anything that falls within  
11 the subject matter of copyright. So, if there are pictorial  
12 graphic or sculpture works that are in the game, we will  
13 register them. If the game board contains artistic features  
14 or instructions, we will register those. So, we will  
15 register anything that falls within the subject matter.

16 THE WITNESS: Your Honor, I think she should be  
17 allowed to finish what she was saying about video games.

18 JUDGE MATHIAS: Well. To the extent that you were  
19 describing what portions of various examines you would  
20 register, I will allow you to continue the answer insofar  
21 as it related to audio visual games.

22 THE WITNESS: Okay. With regard to an electronic  
23 video game where there are copyrightable graphic or  
24 pictorial elements, we would register to that extent. And  
25 if there happened to be any accompanying sounds or music,

1 the registration would go to that part of it also.

2 BY MR. KINNEY:

3 Q Does the Copyright Office grant claims to, or  
4 register claims to copyrights on machines?

5 A No. Not on a machine per se.

6 Q Does it register claims to copyright on mechanical  
7 or parts of machines?

8 A If you are talking about the mechanical aspects,  
9 no. It does register technical drawings. In other words --

10 Q But as as a drawing?

11 A As a drawing, absolutely.

12 Q What does the term "cine --

13 A Cinematic Graphic?

14 Q Yes, thank you. "Cinematic Graphic" mean within  
15 the Copyright Office?

16 A We actually have not defined it for our purposes.  
17 Apparently, and I am not the one to ask this of, the  
18 motion picture section or the motion picture team in the  
19 Performing Arts Section apparently have defined it for their  
20 own terms, but there is no official definition other than  
21 a dictionary definition. It can mean many things to many  
22 people.

23 If you want it in the normal sense, it would be  
24 everything that's embodied in a film; the film authorship.

25 Q And who would be the author of such a film? The

fb-57

1 man who takes the picture or?

2 A In copyright it's generally the person who creates  
3 the work who is the author, but there is a very definite  
4 provision in the statute that where work is made for hire  
5 it is the Employer, or other person who commissioned the  
6 work who is the author. And in the case of most motion  
7 pictures, it's a work made for hire so that Paramount  
8 Pictures or Columbia Pictures, or somebody like that is the  
9 author.

10 Q And the author would not be the people that appear  
11 in the motion picture would it?

12 A Again, it depends on under what conditions it was  
13 created.

14 Q Do you have any direct personal knowledge of the  
15 handling in the Copyright Office of PA 59-977 issued to  
16 Galaxian or PA 68-323 issued to a work entitled Galaxian  
17 Attract Mode, or PA 83-768 which is a work entitled  
18 Pac-Man, or PA-88-049 which is a work entitled Rally-X?

19 A No, I have looked at the registrations since. I  
20 have looked at the applications, but I was not involved in  
21 any way with the registrations.

22 Q Who was the examiner who handled those registrations,  
23 if you know?

24 A To the best of my memory, they were all -- I'm  
25 not sure -- I know that Mr. Albee did examine the Galaxian

fb-58

1 claims and I know Mr. Albee did examine the Pac-Man claim  
2 and I know that the application showed that Mr. Weinstein  
3 examined Rally-X and I don't know about the rest of them.

4 Q I would like to call your attention to Complainant's  
5 Exhibit, or Complainant's Exhibit 119 and, which I believe  
6 has already been entered into evidence.

7 JUDGE MATHIAS: It's in evidence.

8 (Continued on next page.)

9 end #6  
jfb

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BY MR. KINNEY:

Q With the exception of the first page, which is the certificate of certification, I would ask you to look through the remaining pages and ask you if you recognize those?

A Yes, I do.

Q Do you recall the phone conversation with Mr. Katz referred to in the letter dated June 26, 1981?

A I don't think it's a telephone. It says "In accordance with our discussion of yesterday."

Q Oh, was that in person?

A Yes, it was.

Q And would you -- do you recall that discussion?

A Yes.

Q At that discussion did Mr. Katz tell you that there was an informal relationship with the Copyright Office for the grant of special relief?

A That's not my recollection of how it went. I don't remember all parts of the meeting. Mr. Katz definitely was not the only person at the meeting, nor was I. There were at least four or five people from the Copyright Office and there was other than Midway, I do believe representatives of Midway at the meeting also. And we were talking about registrations for video games in general.

Q Did Mr. Katz or anyone from Midway state that

1 they had an informal relationship or arrangement with the  
2 Copyright Office for the grant of special relief?

3 A I can't remember who said what. I do remember  
4 a statement that the Copyright Office was the one who had  
5 suggested, the allegation, the Copyright Office was the one  
6 who had suggested that the appropriate deposit was a video  
7 tape. I did not check with any of the examiners or people  
8 who had been involved in the registration at that time. In  
9 fact, the examiner was on a detail to another part of the  
10 library.

11 My statement at the time was if the allega -- if  
12 the work was first published in a chip and the Copyright  
13 Office suggested the video tape as the appropriate deposit,  
14 certainly it should have been done under a grant of special  
15 relief. And I think what came out of that was well, you  
16 discussed this and it apparently was an informal grant.

17 Q Who stated that there was an informal grant?

18 A I don't remember. I don't know if it was Mr.  
19 Katz, Mr. Plaia, I don't remember. A representative of  
20 Midway.

21 Q I see.

22 A Let me clarify that. I don't think they ever  
23 used the words "special relief." I am the one who used  
24 the words "special relief." They were the ones who said  
25 we were told to deposit the video tapes.

anc

1 Q Well, do you have any knowledge of your own that  
2 there was such an informal arrangement with the office?

3 A No, I do not.

4 Q Under the regulations that were existing as of  
5 March 6, 1980, were you familiar with the copyright  
6 regulations at that time?

7 A Absolutely, yes.

8 Q What was the deposit requirement for a motion  
9 picture?

10 A Something that's called the motion picture, it  
11 would be one complete copy of the work as so -- one complete  
12 copy of the best edition if it's published, if the work is  
13 so published. If it's unpublished, it was one photograph  
14 of every ten minute segment.

15 Q Okay, let's talk about works that are supposedly  
16 published. What other requirements were there for deposit?

17 A That it would come in with a brief description,  
18 or synopsis, of the work.

19 Q Is there any, under the regulations as existing  
20 on March 6, 1980, were any other types of works required  
21 to come in with a synopsis or brief description?

22 A Not that I know of. Not that I remember, no.

23 Q Was the Copyright Office office accepting video  
24 tapes as deposits for motion pictures under its regulations  
25 as of March 6, 1980?

1 A We would take whatever the best edition was and  
2 if it was only published in video tape, then the video tape  
3 would have been the acceptable deposit.

4 Q In the case of a work first published outside  
5 the United States what is the required deposit?

6 A Unlike those published those inside the United  
7 States where we require the best edition, there the deposit  
8 requirements are for one complete copy of the work as first  
9 published.

10 Q Is there any provision in the regulations that  
11 allow that requirement to be varied or waived?

12 A There is the provision for requesting from the  
13 Chief of the Examining Division for special relief to be  
14 granted to deposit other than the copy as first published.

15 Q And do you happen to know where in the regulations  
16 and statute that that is allowed?

17 A There is nothing in the statute with regard to  
18 the request for special relief. It was placed in the  
19 regulation and I believe it's 37 CFR 202.20(d).

20 Q In what form must a request, under the regulations,  
21 must a request for, what did we call it, special relief?

22 A Yes.

23 Q Special relief take?

24 A The way it would usually work would be a request  
25 in writing from the person asking for the special relief

1 with the reasons why they cannot comply with the regulations,  
2 the general regulations. Frequently they also suggest what  
3 they are willing to deposit in its place.

4 Q Do the regulations require that to have been in  
5 writing?

6 A Yes, they do.

7 Q Have you checked the files of the Copyright Office  
8 with respect to any such special relief in the copyright  
9 registrations on Galaxian, Galaxian Attract Mode, Pac-Man  
10 or Rally-X?

11 A I really didn't go back. I did talk to the special,  
12 there is a special assistant to the chief who handles a lot  
13 of this. I did talk to him. He remembered no such request.

14 Q But would the examiner handling the application  
15 know of such a request?

16 A Yes, and if the deposit requirements were not  
17 met, the examiner has the duty of suggesting that is a possible  
18 form to go to.

19 Q What happens in the procedure of the Copyright  
20 Office when a petition to make special is filed? I don't  
21 know if I am using the right term.

22 A Are you talking about a letter like Mr. Katz's  
23 letter of the 26th?

24 Q No. With respect to a copyright application, a  
25 request for special handling.

1 A Special handling?

2 Q Yes.

3 A That's expedited treatment whereby we would hand-  
4 carry it through the various steps. There is a form that  
5 you fill out in the Copyright Office Public Office and  
6 you give the reasons why and the reasons must be that there  
7 is either actual litigation or prospective litigation and  
8 you disclose as much as the application feels they can  
9 disclose. On the basis of what they disclose, the Assistant  
10 Chief of the Acquisitions and Processing Division decides  
11 whether or not the grant of special handling will be made.

12 If it is made, then we actually hand-walk the  
13 application through the various stages of the registration  
14 process.

15 Q Does that place any additional pressures on the  
16 examining staff in handling such applications?

17 A Yes, it does.

18 Q Do you as examiner and chief have any right to  
19 grant retroactive special petitions?

20 A We never looked into that question. I suppose  
21 that if we found that an error had been made and we, the  
22 Copyright Office had misled certain applicants or there had  
23 been various mistakes, or even that we registered using the  
24 wrong copy in the library, later found out that we didn't  
25 get the right copy, that there are certain circumstances

1 under which you would grant special relief after the fact.

2 Q Is your letter of July 14, 1981, a retroactive  
3 grant of special relief?

4 A Actually I think that I didn't really comment on  
5 it. At the time Mr. Albee was away from the office and  
6 all I was saying in the letter that, actually that I said  
7 was going forward and that according to what he stated was  
8 that Midway had been depositing under an informal arrange-  
9 ment with the office. There was no way at that point that  
10 I could check whether or not. I really did not attempt to  
11 go back.

12 Q So, is the answer that your letter is not intended  
13 to have been a grant of retroactive special relief?

14 A No, it was a prospective grant with a statement  
15 recognizing what they had stated, what the parties had  
16 stated.

17 Q Has the General Counsel of the Copyright Office  
18 issued any opinion as to whether under Section 408 the  
19 requirement of the first work published outside United States  
20 may be waived as special -- under special relief?

21 A No, I --

22 MR. BYRNES: I would like to --

23 JUDGE MATHIAS: Excuse me, I will allow Mr.  
24 Brynes to --

25 MR. BRYNES: I would like to know whether the

1 question is directed to opinions which have been made  
2 public or internal.

3 MR. KINNEY: Well, let's make it public because  
4 I anticipate an objection I suppose on the other ones.

5 MR. BRYNES: Well, I am having a little problem  
6 with the question that may be asked for the information with  
7 respect to privileged materials.

8 MR. KINNEY: All right.

9 BY MR. KINNEY:

10 Q Is there any published opinion as to whether or  
11 not special relief is appropriate in the section from the  
12 requirement under Section 408(a)(3) -- or (b)(3) deposit  
13 for registration?

14 A There is no published opinion. It is fact that  
15 it has been granted a number of times.

16 Q In your letter of August 19th --

17 JUDGE MATHIAS: Is there a CX number for that  
18 or an RX number?

19 MR. KINNEY: I'm sorry, that's part of the same  
20 exhibit, Your Honor, CX-119, Page 6 of 6.

21 JUDGE MATHIAS: All right. You may proceed.

22 MR. KINNEY: I'm sorry, I meant to -- your last,  
23 the previous page, Page 5 of 6, with respect to the last  
24 paragraph.

25 JUDGE MATHIAS: That's the letter of July 28th?

1 MR. KINNEY: The letter of July 28th of Exhibit --  
2 Complainant's Exhibit 119.

3 BY MR. KINNEY:

4 Q Could you tell me what are -- you state that when  
5 there are no copyrightable differences between the first  
6 published edition and the United States edition you are  
7 entitled to submit a video tape of the United States edition.  
8 What did you mean by a copyrightable difference?

9 A It's really hard to quantify. Maybe the best thing  
10 I can do is to use an example of where an English language  
11 book is published in the United Kingdom. Our deposit  
12 requirements require one copy of the work as so published  
13 in Great Britain. Sometimes it's very difficult to get that  
14 and there is a United States edition. There are usually  
15 no copyrightable differences. The only differences frequently  
16 are changing the words like "color" from C-O-L-O-U-R to  
17 C-O-L-O-R. That type of editorial difference is not a  
18 copyrightable difference and that's what I was getting at.

19 If the figures, what they were registering was  
20 an audio visual work, the graphic, the pictorial elements  
21 and the sounds. If the graphic elements and the sounds were  
22 the same as those published in Japan, the fact there was  
23 a notice in the name of Midway or there may have been a  
24 substitution with Midway on it would not be a copyrightable  
25 difference. And if the copyrightable content, in other words,

1 the graphic, the pictorial material, the sounds, were the  
2 same then the deposit of the United States edition was  
3 acceptable.

4 Q What if it went on -- there were further changes  
5 such as in the names of the characters from a Japanese  
6 letter form to say an English letter form or even to a new  
7 name?

8 A Again, names themselves are not copyrightable and  
9 the changing of or translating of four or five names, again,  
10 that would not be a copyrightable difference. It goes to  
11 amount.

12 In a book, obviously, if you take a Japanese book  
13 and you translate it to English, that is a copyrightable  
14 translation and there is a distinction. If you only take  
15 four or five words and you translate those words, that number  
16 in and of itself would be considered what we would call  
17 diminimous, not copyrightable.

18 Q Does the examiner handling, excuse me. When assign-  
19 ment is filed with an application is it reviewed by a special  
20 section or person?

21 A Yes.

22 Q And who is that person?

23 A We have a Renewals and Document Section and that  
24 section examines -- well, there is a different type of  
25 examination involved. It's a much more minimal examination

1 with regard to the document.

2 Q And what type of examination is done of the document?

3 A It looks to the regulation and it looks to whether  
4 or not there is, in fact, the actual signature of the  
5 grantor, the one who is granting the rights. That's one  
6 of the main one. Is it visible? I mean can you read it?  
7 Is it not microscopic? But the main thing is is it  
8 complete and does it bear the signature of the grantor.

9 Q Is there any examination as to the substance of  
10 the legal sufficiency of the grant?

11 A No.

12 Q The Copyright Office is not passing on whether  
13 or not this particular paper is adequate to pass?

14 A No.

15 Q Okay. Do the Copyright Office regulations require  
16 the filing of the first documents signed that transfers  
17 ownership?

18 A We wouldn't get into that. The law says that when  
19 you bring a law suit, in order to bring the suit you must  
20 record the document in the Copyright Office. And the document  
21 record is that by which that -- in which, the document in  
22 which you actually took the rights. We never get into that.  
23 We basically are an office of record. We record pretty much  
24 what is given us to record for whatever worth it may be.  
25 It must only meet our definition -- our regulations.

1 Q Would the Copyright Office accept -- well, first  
2 of all, do you know what a ROM is? R-O-M.

3 A Yes.

4 Q Would the Copyright Office accept ROMs as  
5 deposits?

6 A No.

7 Q Is there a stated reason why the Copyright Office  
8 won't accept ROMs?

9 A There is a very good reason. A ROM, or I think  
10 you are talking about the little chip, or the little thing,  
11 may be a copy. But for an examiner to look at the copy-  
12 rightable subject matter, they must have something that's  
13 visually perceptible.

14 So, if a computer program is embodied in a ROM,  
15 our regulations anticipated that computer programs would  
16 be in ROMs and we have a very specific provision in our  
17 regulation for computer programs and we get identifying  
18 material and that is the first 25 pages and the last 25 }  
19 pages of the printout of the work in visually perceptible  
20 form.

21 Q In filing an application, let's speak as of the  
22 period from March 6, 1980 to January 6, 1980.

23 JUDGE MATHIAS: You mean January 6, 1981?

24 MR. KINNEY: '81, I'm sorry.

25 THE WITNESS: '81, yes.

BY MR. KINNEY:

1  
2 Q During that period, did the regulations of the  
3 Copyright Office, when someone deposited identifying material  
4 during that period, did the regulations require that it be  
5 visually perceptible?

6 A Yes.

7 Q Would a video tape have been accepted under those  
8 regulations?

9 A Because we can view the material that's on the  
10 video tape. We have the viewing machines.

11 Q Did you have the viewing machines during that  
12 period?

13 A It's my understanding that at some -- you are talk-  
14 ing about video tape machines?

15 Q Yes.

16 A It's my understanding that maybe at the time the  
17 first application came in we may not have had the particular  
18 type of machine to do the type of -- all types of video  
19 tapes. But sometime during that period we did get machines  
20 to look at all the various formats that are widely used in  
21 the United States.

22 Q So, did the regulations change?

23 A No. Video tapes were always acceptable because  
24 we were, in most cases, able to see them. And it's my  
25 understanding that in some cases where we did not have the

Eb-14

1 equipment, we managed to borrow other equipment to look at  
2 it.

3 Q If I submitted to the Copyright Office an applica-  
4 tion for claim on copyright on a statue, could I submit a  
5 video tape of the statue as a deposit under the regulations?

6 A We probably would take it. The way that -- well,  
7 you would have to get special relief. We have a regulation  
8 that covers three dimensional works of art. We definitely  
9 do not want those to be deposited. What we ask for is  
10 photographs showing all of the copyrightable features and  
11 we even set out the dimensions for the photographs. But  
12 if someone told us we don't have the photographs and would  
13 you allow us to make a video tape of the statue and all of  
14 its various elements, we probably would allow that to be  
15 deposited.

16 Q But under the regulations --

17 A It's photographs.

18 Q Yes. I am afraid my reading of the regulations  
19 and yours is somewhat different so -- well, we will let the  
20 regulations speak for themselves I suppose.

21 MR. KINNEY: I believe that completes my examina-  
22 tion of Ms. Peters.

23 MR. PLAIA: Could we have two minutes or one  
24 minute, Your Honor?

25 JUDGE MATHIAS: All right.

1 (Pause)

2 CROSS-EXAMINATION

3 BY MR. PLATIA:

4 Q Ms. Peters, can you tell me what your educational  
5 background is?

6 A Sure. I have a Bachelor's Degree in social  
7 sciences and education, a law degree from George Washington  
8 University.

9 Q Are you a member of the bar?

10 A Yes.

11 Q In regards to the meeting attended by Mr. Katz  
12 and myself that you mentioned, was it your suggestion that  
13 we make the request pursuant to 202.20(d)? Do you recall  
14 that?

15 A Yes. It's my recollection, and I became aware  
16 of the whole issue of video games rather late in the game,  
17 and evidentially the Examining Division had been making  
18 certain registrations. The first time I really looked at  
19 it was when the case of Stern versus Kaufman came down and  
20 the subsequent decision by the ITC. And I really hadn't  
21 done very much looking into what the Examining Division had  
22 done in the past when I got into that meeting.-

23 As a result of that meeting, I remember discussing  
24 the audio and visual portions, the fact that the game  
25 according to what I understood you to say was published

b-16

1 in the form of a chip, and stating that there was really  
2 no provision in the regulation as drafted for deposit. We  
3 knew that we didn't want the chip. We knew that we didn't  
4 want the game, and let we didn't have any special provisions  
5 in the regulation for the deposit of anything else. And  
6 stating that perhaps the Examining Division was unaware of  
7 some of these problems because of the history of the division  
8 where there was a new law and everybody was new and perhaps  
9 that that the only way I saw at this point was to go to  
10 a request for special relief. And that, obviously, it would  
11 be granted.

12 Q Yes, let me confirm that. You also indicated  
13 that if the request were made it would be granted?

14 A Absolutely.

15 Q Do you also recall at that meeting that Mr.  
16 Katz was explaining the different registrations that had  
17 been made on behalf of Midway --

18 A Right.

19 Q -- and explaining to you what had been deposited  
20 and do you remember who suggested that it seems to be that  
21 there is an informal procedure?

22 A I may be even have been the one to say that. I  
23 don't remember. I do recollect stating that what seems to  
24 be the appropriate deposit is the video tape. That perhaps  
25 the examiner reached the same conclusion and did not perhaps

1 realize what was involved in this.

2 Q In Mr. Katz's letter he indicated listing, as a  
3 matter of fact, this is the letter of June 26th?

4 A Right.

5 Q He listed in that letter five different deposits,  
6 registrations.

7 A Right.

8 Q And at that meeting did he describe to you the  
9 deposits that had been made with those registrations?

10 A Yes, he did.

11 Q And did you understand when you received this letter  
12 from Mr. Katz, especially in regards to the first paragraph,  
13 that he was asking for special relief in regards to also  
14 these five specific registrations?

15 A When I look at the letter today and when I looked  
16 at it a couple days ago, I recognized that that perhaps was  
17 asking especially in the last paragraph. I perhaps read,  
18 the letter too quickly because I definitely did not respond  
19 to it or did it really click at that point that that was  
20 what he was asking for at that point. I did not address  
21 that in my letter.

22 I can see now where, yes, it very definitely  
23 says would you please formally confirm it at your earliest  
24 convenience the granting of relief in the past as well as  
25 your intentions to continue the relief. And I -- but I did

28  
1 not, and I did not pick it up.

2 Q Well, I call your attention to the first paragraph  
3 of that letter.

4 A I know.

5 Q Do you recall having been aware of that when you  
6 were answering?

7 A Yes, what I said was that he stated there was an  
8 informal arrangement and I said in the meeting that if what  
9 you were saying was true, there apparently was. But I did  
10 not go back and talk to the examiner. I did not go back,  
11 the examiner wasn't there. So I really did not know what  
12 the arrangements were at the time.

13 Q Regardless, if the special relief were requested  
14 to be retroactively applied, could you grant that relief?

15 MR. KINNEY: Objection, that's a speculative  
16 question.

17 BY MR. PLAIA:

18 Q What I meant was did you grant it?

19 A I didn't. What I said was I didn't pick it up  
20 and I did not act on it. If we were asked to go back --  
21 if Midway came in and said there apparently was some mis-  
22 understanding and we now want to clarify the record and do  
23 certain things, it is possible that we, you know, that we  
24 would do that.

25 In all of our procedures we have ways to correct

1 and amplify records that have been made.

2 Q Can I ask you then to turn to July 14th letter?

3 A Right.

4 Q And look in the middle of the second paragraph.

5 A Right.

6 Q Where it says, "I am, therefore, granting your  
7 request for special relief on an ongoing basis."

8 A Right.

9 Q What did you mean when you said that?

10 A I understood that Midway was in the electronic  
11 video game business and that they would from time to time  
12 be registering and that certainly this was the way to deposit  
13 and the way to register. And that this was exactly what  
14 we wanted to be deposited. We wanted video tape.

15 MR. PLAIA: That concludes my cross, Your Honor.

16 JUDGE MATHIAS: Mr. Bailey.

17 MR. BAILEY: Yes, Your Honor.

18 CROSS EXAMINATION (Continued)

19 BY MR. BAILEY:

20 Q Ms. Peters, I personally need some clarification.

21 The first request for special relief for depositing the  
22 video tapes was by the Complainant in this matter, Midway.  
23 Was the letter of June 26, 1981?

24 A You are saying the first letter with regard to  
25 any request for special relief by any video game, electronic

1 video game manufacturer or Midway?

2 Q Midway.

3 A Midway. Yes, that I know of, that I personally  
4 know of, yes.

5 Q You also testified that your response to that  
6 letter was prospective and not retroactive?

7 A What I said was that I did not read the letter  
8 perhaps carefully enough and did not pick up this specific  
9 request to go back so that my letter only addressed prospec-  
10 tive, yes.

11 Q I see. A written request for special relief is  
12 required under the regulations of a copyright?

13 A Yes. If the examiner picks up that what they  
14 are dealing with is something, the copy they have is something  
15 other than what the regulations require and we will be  
16 registering with something other than that, at that point  
17 there should be a written request for special relief.

18 Q When you are dealing in a situation, as we have  
19 here, where the first publication was in a foreign nation --

20 A Right.

21 Q -- and there being a requirement that there be  
22 no copyrightable differences between the first publication  
23 and the deposit, in the Copyright Office what requirements  
24 do you have to show that there are no copyrightable dif-  
25 ferences?

1 A We take the assertions of the parties.

2 Q Okay.

3 A We are essentially an office of record and we do  
4 not, like the Patent Office does, go back and research out  
5 facts.

6 Q Okay, no, I am asking about -- I just want -- do  
7 you, when you say "assertions" what form should they be in?

8 A The statement of the person --

9 Q Written statement or oral statement?

10 A Yes. Sometimes we have taken oral statements.

11 It's preferable if it's written.

12 Q Was there any such statement in this particular --

13 A Unfortunately, no.

14 Q Was there any statement in this particular case  
15 by counsel for Midway or any other documents relating to  
16 the transference of interest to Midway by Namco?

17 A I think --

18 Q Except for the assignment.

19 A I think you are asking questions that don't  
20 properly belong to me. I really only got involved in this  
21 in starting May, June, 1981.

22 Q So you are not sure what --

23 A I had nothing to do with anything that went on  
24 prior to that date.

25 Q I see, okay.

1 MR. BAILEY: I have no further questions.

2 JUDGE MATHIAS: Mr. Kinney?

3 MR. KINNEY: No further questions, Your Honor.

4 JUDGE MATHIAS: Thank you very much, Ms. Peters.

5 You are excused.

6 (The witness was thereupon excused.)

7 JUDGE MATHIAS: Mr. Kinney, do you have --

8 MR. KINNEY: I would like to call Mr. Albee if  
9 we could, or could we perhaps take a five minute break?

10 JUDGE MATHIAS: All right, and then maybe we will  
11 know whether Mr. Albee is available.

12 We will take a five minute break.

13 (Whereupon, a recess was taken.)

14 JUDGE MATHIAS: Back on the record. Mr. Plaia,  
15 you had a request?

16 MR. PLAIA: Yes, Your Honor. Just moments after  
17 Mary Beth Peters stepped down my partner brought me over  
18 something I had been seeking for several days to use in  
19 conjunction with questioning Ms. Peters. That being several  
20 registrations that were issued that I wanted to question  
21 her on and I asked her if she would mind stepping back up  
22 and she said that she would not. I asked Mr. Kinney and  
23 he said he has objection to what I want to ask her.

24 MR. KINNEY: On top of that, Your Honor, we are  
25 trailing a very short time schedule and I already have

1 called Mr. Albee.

2 JUDGE MATHIAS: How long will these questions take?

3 MR. PLAIA: A very few minutes.

4 JUDGE MATHIAS: I will give you a maximum of  
5 five minutes to establish your point. I will recall her  
6 for that.

7 MR. PLAIA: Could I ask Mr. Albee to leave the  
8 room when Ms. Peters goes on?

9 JUDGE MATHIAS: Well, what is the purpose? I  
10 really don't see any need for sequestration at the moment.  
11 Unless you can give me a good reason I -- it's not that I  
12 really opposed sequestration.

13 MR. KINNEY: We have been following that practice,  
14 Your Honor, and I would also --

15 JUDGE MATHIAS: I had had no request before now  
16 for sequestration. Mr. Kinney started to approach the  
17 subject and changed his mind, but I --

18 MR. KINNEY: Well, counsel agreed among ourselves  
19 to just do it and we have been following that practice  
20 both with my witnesses and their witnesses.

21 JUDGE MATHIAS: You have been following the  
22 procedure of sequestration?

23 MR. KINNEY: Yes, yes, we have.

24 JUDGE MATHIAS: All right, if you have been doing  
25 that, then I will allow it. Go ahead. All right, you may

1 resume, Mr. Plaia.

2 MR. PLAIA: Your Honor, I will add copies of these  
3 very shortly. Like I said, I just got these in my hands  
4 but I would like to have marked for identification as  
5 CX-2, CX-3. First, CX-2 would be a January 28 --

6 JUDGE MATHIAS: Excuse me, you are going to have  
7 other CX-2 and 3, don't you?

8 MR. PLAIA: I believe I have CX-1.

9 JUDGE MATHIAS: CRX.

10 MR. PLAIA: I'm sorry, CRX.

11 JUDGE MATHIAS: All right, CRX-2 and CRX-3,  
12 all right.

13 MR. PLAIA: First, CRX-2 is a January 28, 1980  
14 application for, and it's actually a registration entitled  
15 "Automobile Collusion Avoidance Game" and the author is  
16 Gremlin Industries.

17 CRX-3 is PA 119-589 dated June 20th, 1979 and  
18 entitled "Automobile Collusion Avoidance Game" and the  
19 author of that is Gremlin Industries, Inc.

20 MR. KINNEY: You haven't offered them. I haven't  
21 seen them in detail.

22 (Pause)

23 MR. PLAIA: These are marked, Your Honor?

24 JUDGE MATHIAS: Yes, they may be so marked.  
25

(The documents referred to were  
marked for identification as  
Complainant's Exhibit Nos.  
CRX-2 and CRX-3.)

Whereupon,

MARY BETH PETERS GRINGRY

having been previously duly sworn, was recalled as a witness  
herein and was examined and testified further as follows:

CROSS-EXAMINATION (Continued)

BY MR. PLAIA:

Q Ms. Peters, can you take look at CRX-2 and CRX-3  
and tell me if you recognize these documents?

A You mean have I personally seen them before?

Q Yes.

A No.

Q Are you aware of these registrations outside of  
the documents?

A No.

Q Let me then ask you, are you familiar with any  
other registrations of video games where deposits have been  
accepted?

A You mean --

MR. KINNEY: Objection, Your Honor, the right  
to cross-examine or examine Ms. Peters was granted as to  
these documents and this is not related to these documents.

JUDGE MATHIAS: My main purpose here is to get as full a story as possible. I will allow this. He is still running very close to his time limit but I will allow that question.

THE WITNESS: You are asking if I am aware of other registrations in which the video tapes were used as the deposit copies?

BY MR. PLAIA:

Q For video games?

A For video games. Yes.

Q And can you tell me what the deposits that were accepted in that respect, in respect to those games?

A It's my understanding that all the registrations that were made with regard to electronic video games, when we were registering the audio visual work embodied in it, was a video tape.

Q And does that include others besides Midway Manufacturing Company?

A It includes Williams, Stern. It includes all of the various parties that I am aware of.

Q Then is it true for a substantial number of video games manufacturers you made -- you have issued registrations based on deposit of video tape?

A That's right.

Q And is that the same type of deposit that you

1 recognize when you look at the Galaxian deposit made by  
2 Midway Manufacturing Company?

3 A It's my understanding that the video tapes are  
4 basically all the same and that at the point of your meeting  
5 when I found out that we should have been going the special  
6 relief request, that as they come in, we write to each one  
7 of these firms.

8 Q And you knew that before the special relief granted  
9 to Midway, had there been special relief granted to the  
10 others in regards to the deposits?

11 A Yes. Well, not before but since the letter of  
12 -- Mr. Katz's letter of June 26, we have received such  
13 letters and such requests have been granted.

14 Q Then is it proper to say that in the Copyright  
15 Office the proper deposit for the video game is the tapes  
16 such as was deposited in the Galaxian case?

17 MR. BAILEY: Your Honor, objection.

18 JUDGE MATHIAS: I'll sustain the objection.

19 MR. PLAIA: I have another letter that Mr. Bailey  
20 just showed me that I would also like to mark and just get  
21 her to identify it. It was written by Ms. Peters in  
22 August of 1981.

23 JUDGE MATHIAS: May I see it?

24 MR. KINNEY: May I see it, too?

25 (Pause)

1 JUDGE MATHIAS: You may see it, Mr. Kinney.

2 I hope this is the very last item to be taken up. There  
3 is no reason these items couldn't have been, especially the  
4 general examination you have just gone through, couldn't  
5 have been covered in your regular cross.

6 MR. PLAIA: Your Honor, I would ask that this  
7 letter dated August 13, 1981, consisting of two pages and  
8 unsigned but showing a signature block for Mary Beth Peters  
9 be marked as CRX-4?

10 JUDGE MATHIAS: It may be so marked.

11 (The document referred to was  
12 marked for identification as  
13 Complainant's Exhibit No.  
14 CRX-4.)

15 BY MR. PLAIA:

16 Q Ms. Peters, I show you CRX-4 and ask you if you  
17 recognize it?

18 A Yes, I do.

19 Q And is this one of the instances that you just  
20 testified to where special relief was granted on similar  
21 deposits to the Galaxian?

22 A Yes. Well, actually a different letter came in.  
23 This law firm represents Atari, Incorporated, and a letter  
24 from Atari requesting special relief, several had come in  
25 and the relief had been granted. I was asked to write a

1 letter stating our general policy as it exists at this time.  
2 And that's what this letter basically does. It states the  
3 policy as it exists now.

4 Q Can you tell me the reason for having to state  
5 the policy now was that there was an unclear policy before?

6 A It's true that I as a Division Chief did not  
7 look at how we were registering video games until June and  
8 July. I picked up some problems with the way they were  
9 registering them and as a result we have been writing various  
10 letters to the people who deposit these. And apparently  
11 there was a need to get a statement of the policy as it  
12 exists today.

13 MR. PLAIA: That concludes, Your Honor.

14 JUDGE MATHIAS: Mr. --

15 MR. PLAIA: Oh, I'm sorry, can I have that letter  
16 admitted into evidence, CRX-4?

17 JUDGE MATHIAS: Any objection?

18 MR. KINNEY: It does not seem to me, since the  
19 policy is not the policy that was in effect on November 13,  
20 1980 and January 6, 1981 when the Pac-Man and Rally-X  
21 registrations were issued that it is relevant.

22 JUDGE MATHIAS: I'll overrule the objection.  
23 It may be relevant to the question of whether or not there  
24 was a policy at that time and it appears that at least  
25 it may have minimal relevancy to the issues in this case.

1 So I will receive CRX-4 in evidence.

2 (The document referred to, having  
3 been previously marked for identi-  
4 fication as Complainant's Exhibit  
5 No. CRX-4, was received in  
6 evidence.)

7 MR. BAILEY: I have no objections either, Your  
8 Honor.

9 JUDGE MATHIAS: And before Mr. Kinney gets  
10 an opportunity for redirect, do you have any cross on this  
11 subject, Mr. Bailey, that's just been raised?

12 MR. BAILEY: No, Your Honor.

13 JUDGE MATHIAS: Mr. Kinney, do you have any  
14 further questions?

15 MR. KINNEY: No.

16 JUDGE MATHIAS: Thank you very much.--

17 THE WITNESS: Thank you.

18 JUDGE MATHIAS: -- Ms. Peters, you are excused  
19 a second time.

20 (The witness was thereupon excused.)

21 JUDGE MATHIAS: Now do you wish to call your  
22 next witness?

23 MR. KINNEY: Yes, I would like to call Mr.  
24 Albee.

25 JUDGE MATHIAS: All right.

1 MR. BYRNES: May I renew my request that the  
2 need for Mr. Albee's testimony be re-evaluated in light  
3 of the testimony of Ms. Peters?

4 JUDGE MATHIAS: Yes, but I think that I am going  
5 to have to -- I have re-evaluated it as Ms. Peters has  
6 testified and I believe that we will have to hear from Mr.  
7 Albee as to factual matters.

8 MR. BYRNES: Thank you, Your Honor.

9 JUDGE MATHIAS: Mr. Albee, will you please take  
10 the stand?

11 Whereupon,

12 DAVID ALBEE  
13 having been first duly sworn, was called as a witness  
14 herein and was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. KINNEY:

17 Q Would you state your name for the record, please?

18 A David Albee.

19 Q And by whom are you employed, Mr. Albee?

20 A The Copyright Office, the Library of Congress.

21 Q And what is your title?

22 A Senior Copyright Examiner.

23 Q Mr. Albee, in the period of February, 1980 through  
24 January, 1981, were you -- what was your function with the  
25 Copyright Office? Or what was your job?

1 A Senior Copyright Examiner.

2 Q Were you in charge for handling special types of  
3 copyrights?

4 A I worked primarily with motion pictures.

5 Q Did you handle a series of copyright registrations  
6 that were for works PA, excuse me, strike that.

7 Did you handle a series of PA, performing arts  
8 applications for Midway Manufacturing Company during that  
9 period of time?

10 A Yes, sir, I did.

11 Q Are these an application that resulted in PA  
12 59-977, Galaxian, that bears the date March 6, 1980?

13 A To the best of my memory, it is, sir.

14 Q Can you recall the circumstances surrounding this  
15 application? For instance, on March 6th, 1980, do you  
16 recall the application being filed with the Copyright Office  
17 and coming to your attention?

18 A Yes, sir, in general terms I do.

19 Q What was your first contact, or knowledge of the  
20 application on that date?

21 A I was asked to come to the office of the head of  
22 the Visual Arts Section and to meet with a gentleman from  
23 a law firm who was submitting an application for this work.

24 Q And did you do that?

25 A Yes, I did.

1 Q Was that gentleman Mr. Craig Larson?

2 A Yes, it was.

3 Q What happened at that meeting as best as you can  
4 recall?

5 A Mr. Larson had had prior discussion with the head  
6 of the Visual Arts Section and I do not know the content  
7 of that discussion, but the -- I was asked to come up to  
8 look at the video cassette was being deposited, or a request  
9 was being made for copyright registration using this as a  
10 deposit copy.

11 Q Have you had occasion to review that file recently?

12 A I reviewed the application recently, a copy of  
13 the application recently.

14 Q Did Mr. Larson make any representations to you  
15 as to what he was making application to register as what  
16 was the work?

17 A Mr. Larson indicated that he was interested in  
18 registering "the game". At that point in time it was my  
19 understanding that the practice of the office was to study  
20 works that were deposited for registration which might  
21 involve computer programs or computer chips. We were not  
22 able to register under special handling which was requested  
23 at that time "a game" in this fashion; that was my under-  
24 standing of the procedures of the office at that point in  
25 time.

1 Q You did grant, or pass to PA 59-977 to Galaxian  
2 on March 6, 1980, did you not?

3 A Yes, sir.

4 Q What, if that's not a copyright registration on  
5 a game, what is the subject matter of that copyright  
6 registration?

7 MR. BYRNES: Objection.

8 JUDGE MATHIAS: I will hear from Mr. Byrnes.

9 MR. BYRNES: I'll have to object to that question  
10 as I believe it calls for a conclusion and an opinion on  
11 the part of the the witness. My understanding was that the  
12 testimony of this witness would be limited to factual  
13 matters such as what representations were made to him in  
14 the course of seeking registrations.

15 MR. KINNEY: All right.

16 JUDGE MATHIAS: That is correct. Objection is  
17 sustained.

18 BY MR. KINNEY:

19 Q What representations -- were any other representa-  
20 tions as to the nature of the work made to you with regard  
21 to PA 59-977, Galaxian?

22 A Would you repeat the question?

23 Q Were any representations made to you regarding  
24 the work of PA 59-977, Galaxian?

25 A I am not sure what you are getting at, sir.

1 Q Well, did Mr. Larson tell you that he was attempt-  
2 ing to register a video tape that was used in promoting or  
3 advertising the game Galaxian?

4 A I do not remember exactly what Mr. Larson told  
5 me. I do remember that my feeling was, my own --

6 MR. PLAIA: Objection. His feelings, I think we  
7 said we weren't getting into, Your Honor.

8 JUDGE MATHIAS: Well, we are into -- I'm afraid  
9 I am going to have to sustain an objection as to any of  
10 the thought processes and mental impressions of the witness.  
11 It appears to be that the state of the law on this subject  
12 allows only testimony as to relevant matters of fact and  
13 does not allow speculative questions or conclusions based  
14 on such speculation or any in-roads into the thought processes  
15 of the examiner.

16 We are going to have to stick strictly with what-  
17 ever factual allegations were made to him: What was stated  
18 to him and what he stated to Mr. Larson.

19 BY MR. KINNEY:

20 Q Did you ask Mr. Larson what was on the video tape?

21 A I believe I viewed the video tape.

22 Q Did you also ask him what was on the video tape?

23 A I cannot honestly answer, I can't remember. I  
24 really couldn't tell you.

25 Q Do you have any notes regarding your, regarding

1 the Galaxian video tape or the Galaxian applications?

2 A. No, sir, I checked for some. I do not have any.

3 Q. You recall a telephone conversation with myself?

4 A. Yes, sir.

5 MR. PLAIA: Your Honor, I don't understand --

6 JUDGE MATHIAS: Well, at the moment I don't think  
7 there is an objectionable question. I will allow him to  
8 proceed if he can refresh the witness's memory in any way,  
9 he may do so.

10 BY MR. KINNEY:

11 Q. During that conversation did you recall or state  
12 to me that you had been told that the video tape was used  
13 in promotion of the game Galaxian?

14 A. I may have. I think I said I understood --

15 MR. PLAIA: Objection.

16 JUDGE MATHIAS: I'm afraid I am going to have to  
17 ask you, Mr. Albee, to refrain from giving your mental  
18 impressions concerning this. If you have -- you either  
19 told him or you didn't tell him that Mr. Larson told you,  
20 made a certain statement to you.

21 MR. KINNEY: May I ask him if he can recall what  
22 he did tell me over that phone, in that phone conversation?

23 MR. PLAIA: I think he can only answer if he  
24 didn't say --

25 (Simultaneous conversation)

1 JUDGE MATHIAS: If in that telephone conversation  
2 he got into areas that I cannot permit him to testify to,  
3 I am not going to allow him to put it on this record.  
4 Now, if he -- you asked him a specific question and that  
5 was whether or not he recalls telling you that Mr. Larson  
6 made a particular statement to him in the course of your  
7 telephone conversation. And I will allow him to state whether  
8 or not he recalls making that statement to you. That is  
9 certainly permissible, but I am not going to allow through  
10 the back door impermissible testimony into this record.

11 MR. KINNEY: Well, Your Honor, I believe what he  
12 said two weeks is a factual question.

13 MR. PLAIA: I don't --

14 JUDGE MATHIAS: I would agree to that to a certain  
15 degree, Mr. Kinney. If in fact he told you that Mr. Larson  
16 made a certain statement to him, then that is a very proper  
17 question. That's the question you put to him, but now  
18 he's answering a different question. He is stating that  
19 he believes -- well, he started to state that he believed  
20 that he stated an understanding to you rather than what  
21 something that Mr. Larson said. Now we are getting into  
22 another area. If we just stick to any statements that he  
23 made to you that Mr. Larson made to him, or that he made  
24 to Mr. Larson at the time.

25 MR. KINNEY: Okay.

1 BY MR. KINNEY:

2 Q With that preface, can --

3 A I do not believe that I specifically quoted a  
4 statement one way or the other, a specific statement.

5 Q Okay. Now, didn't you tell me that Mr. Larson  
6 had told you that this was a promotional video tape?

7 MR. PLAIA: I think that --

8 JUDGE MATHIAS: I'll overrule the objection.  
9 Do you recall making that statement to Mr. Kinney?

10 THE WITNESS: It was -- I recall making the state-  
11 ment to Mr. Kinney something to the effect that it was my  
12 understanding or --

13 JUDGE MATHIAS: I'll strike the "understanding".  
14 (Continued on next page.)

#8  
jfb

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Mr

732

1           Q     Mr. Albee, I recognize that you may not well  
2 remember precisely what Mr. Larson said to you, that is  
3 perfectly understandable, it is a long period of time, but  
4 can you give us the substance of what he said to you?

5           MR. PLAIA: I object, Your Honor. I think we  
6 should go for conciseness. I think, as serious as the accu-  
7 sation is in this case, I don't think we should have anything  
8 other than preciseness coming before Your Honor.

9           JUDGE MATHIAS: I don't think this witness or any  
10 other witness can state in quotation marks what  
11 was told to him yesterday, let alone two years ago. The  
12 question as it is put is a legitimate one.

13           I will allow him to state, the best that he recalls,  
14 any statement made by Mr. Larson to him. I will not permit  
15 him to state any understanding he had from statements or what  
16 his mental processes were in assimilating that statement  
17 into his decision. But, I will allow him to testify to the  
18 best of his recollection as to any statement that Mr. Larson  
19 made to him.

20           MR. PLAIA: But--two things Your Honor. Number one,  
21 I think that we need a foundation to see, first of all,  
22 whether he does recall his conversations, and secondly, if  
23 we can have some foundation as to exactly what conversation  
24 he is being asked to recall.

25           JUDGE MATHIAS: I believe he only stated that he

1 Had one conversation with Mr. Larson. Is that correct?  
2

3 THE WITNESS: Yes sir.

4 JUDGE MATHIAS: And, this was in an office in the  
5 Division?

6 THE WITNESS: That is right, sir.

7 JUDGE MATHIAS: I will allow him to state to the  
8 best of his recollection, the statements Mr. Larson made to  
9 him, and the statements he made to Mr. Larson during the course  
10 of that meeting.

11 Now, you may proceed, if you can remember any  
12 statements.

13 THE WITNESS: To the best of my recollection, it  
14 was indicated that the game was published in videotape form  
15 and that the copies were used for promotional purposes.

16 BY MR. KINNEY:

17 Q. Mr. Albee, were you asked to grant any informal  
18 or special relief from the requirements of the copyright  
19 office regulations?

20 A. No sir. I was not.

21 Q. With respect to the series of copyright registrations  
22 PA59-977 Galaxian PA68-323 Galaxian Attract Mode, PA83-768  
23 PAC MAN and PA88-049 RALLY-X, was there anything said to you  
24 or any representation made in writing to you that would--  
25 regarding the grant of any special relief from the regulations  
of the Copyright Office?

1 A No sir.

2 Q Did you grant any special relief from the regula-  
3 tions of the Copyright Office?

4 A No sir. It is not within my authority.

5 Q Did Application No. PA59-997 Galaxian meet the  
6 requirements for the registration of the motion picture?

7 MR. PLAIA: Objection.

8 JUDGE MATHIAS: I don't know if a proper foundation  
9 has been laid for that question, Mr. Kinney. We don't even  
10 know that it was--I mean, you haven't even established that  
11 it was--the application was granted on the basis that it was  
12 a motion picture.

13 BY MR. KINNEY:

14 Q Was the application granted on the basis that it  
15 was a motion picture?

16 MR. PLAIA: Objection. The application speaks for  
17 itself. It calls for his opinion and thought processes.

18 JUDGE MATHIAS: Mr. Byrnes, do you have any objec-  
19 tion to this particular question?

20 MR. BYRNES: Your Honor, I'm having a lot of  
21 problems with this whole line of testimony. I don't see--  
22 I said, I'm having difficulties with this line of questioning  
23 and I don't see that the witness has these documents in front  
24 him. I'm not even sure that it has been established that he  
25 worked on that particular case, and I think that the question

1 could be factual but it also, insofar as it calls for a legal  
2 conclusion, I think it would be improper.

3 JUDGE MATHIAS: Is the copyright registration for  
4 the Galaxian game available?

5 MR. KINNEY: I have a fairly bad copy.

6 JUDGE MATHIAS: I want to ask a quick question of  
7 Mr. Albee and maybe it will help.

8 Would a motion picture be entitled to audiovisual  
9 work in the application or would they be considered separate  
10 types of categories?

11 THE WITNESS: A motion picture is a sub-category  
12 of an audiovisual work--it's a subgenous. It's a type of  
13 audiovisual work.

14 JUDGE MATHIAS: I'm not yet sure of the basic  
15 relevancy of the question, Mr. Kinney.

16 MR. KINNEY: Well, Your Honor, we have--the basic  
17 question is whether or not this work was granted on the  
18 basis of it being a motion picture. I believe that under  
19 the definition section of the copyright statute, it defines  
20 an audiovisual work as the generic term that includes motion  
21 pictures, slide shows and other such works.

22 And, if this was granted on the basis of it being  
23 a motion picture,--

24 MR. PLAIA: Your Honor, aren't we--

25 JUDGE MATHIAS: Under the circumstances, I believe

1 you are probing his mental processes and you have yet to  
2 establish--the proper thing that you wish to establish is  
3 whether or not this was presented to him factually as a motion  
4 picture. I have seen no foundation statements for that as  
5 of yet.

6 BY MR. KINNEY:

7 Q Mr. Albee, would it refresh your recollection if  
8 I gave you a copy of PA59-977?

9 A I don't believe so. That's Galaxian.

10 Q All right. Did the application for PA--that even-  
11 tually resulted in PA59-977 meet all of the requirements for  
12 a motion picture copyright application?

13 MR. PLAIA: Objection.

14 JUDGE MATHIAS: Objection sustained. What is the  
15 term used on the application, Mr. Kinney? Does it say  
16 audiovisual work or motion picture?

17 MR. KINNEY: It says nature of this work--audio-  
18 visual work.

19 JUDGE MATHIAS: Okay, until you can establish  
20 some reason for narrowing it down, please address your  
21 question to audiovisual work. That's the only foundation  
22 you have up to this point.

23 MR. KINNEY: All right.

24 JUDGE MATHIAS: I'm not sure the question is an  
25 objection on other grounds, but let's hear it that way.

1 MR. KINNEY: Okay.

2 BY MR. KINNEY:

3 Q Mr. Albee, what are--is there a difference in the  
4 requirements for general audiovisual works and motion pic-  
5 tures?

6 MR. PLAIA: Objection.

7 MR. KINNEY: Of the copyright office?

8 MR. PLAIA: Your Honor, we--

9 MR. BYRNES: Your Honor, I kind of object to that  
10 question too. I mean, that is asking Mr. Albee to interpret  
11 the regulations and my understanding of today's proceeding  
12 was that Ms. Peters would be made available for the express  
13 purpose of explaining to the court and the parties just what  
14 the effect of the various Copyright Office regulations was.

15 I don't think Mr. Albee is in a position to inter-  
16 pret those regulations.

17 MR. KINNEY: Your Honor, I'm just asking him to tell  
18 me as the examiner in the movie section what it is that is  
19 required in a day-to-day operation where motion versus other  
20 types of audiovisual works as for the application.

21 MR. PLAIA: Your Honor?

22 JUDGE MATHIAS: Yes?

23 MR. PLAIA: I want to object also because I feel  
24 it is improper. May I speak further?

25 JUDGE MATHIAS: Yes you may.

1 MR. PLAIA: I'm looking at the Title 37 which talks  
2 about information to be given by the Copyright Office and  
3 it clearly indicates that the Copyright Office does not under-  
4 take the making of comparisons of copyright deposits to deter-  
5 mine similarity between the works, nor does it give legal  
6 opinions or advice on such matters as the validity or status  
7 of any copyright other than the facts shown in the records  
8 of the office.

9 That is also as to the sufficiency extent or scope  
10 of compliance with the copyright law. And, I think that when  
11 we talked about --

12 JUDGE MATHIAS: I don't think you have to go any  
13 further. I have been reviewing my own thought processes.  
14 I'm going to sustain the objection. I believe you are getting  
15 him into an interpretation of the law. I believe that that  
16 is improper.

17 I told you that I would allow questioning as to  
18 factual matters. What Mr. Larson said to him and what he  
19 said to Mr. Larson. I think if you just stick to that, then,  
20 in your brief, you can say why the application was defective  
21 if it does not apply here, but does not comply with the law.  
22 But, I am going to restrict you strictly to factual matters.  
23 It appears to me that the case law is quite plain, including  
24 the case law that you have cited to me that this is the  
25 only proper area of inquiry.

1           So, again, I return two things. What Mr. Larson  
2       said to him and what Mr. Albee said to Mr. Larson. You may  
3       probe that area. That's all.

4           BY MR. KINNEY:

5           Q     Where did this meeting take place?

6           A     To the best of my recollection, in Bernard Dietz's,  
7       Head of the Visual Arts Section.

8           Q     And, was this meeting with Mr. Larson that took  
9       place on March 6, 1980 when the Galaxian application was  
10      filed that you're referring to?

11          A     It's the meeting that took place when the Galaxian  
12      application was filed. I cannot attest to the date.

13          Q     Okay. Who was present at this meeting?

14          A     In the first instance for introductory purposes,  
15      Mr. Dietz, Mr. Larson and myself. And, then, later Mr.  
16      Larson and myself. Mr. Dietz left.

17          Q     What did Mr. Larson have with him with respect to  
18      the application papers?

19          A     I cannot clearly remember, sir.

20          Q     Did he have a copy of the Form PA?

21          A     He may have. I cannot honestly recall. I don't  
22      want to put myself on record with a firm statement that he  
23      did.

24          Q     Was there a copy of the videotape?

25          A     I believe so.

1 Q Was there a copy of a synopsis?

2 A I cannot recall.

3 Q How long was this conversation?

4 A Perhaps 20 minutes--15 or 20 minutes.

5 Q Did you discuss the requirements of deposit with  
6 the Copyright Office at this conference?

7 A We discussed the copyright deposit requirements for  
8 motion pictures at that point in time.

9 Q And, can you recall what you stated with respect  
10 to the copyright requirements of motion pictures?

11 A Yes.

12 Q Would you tell us as best as you can recall?

13 A The deposit requirement for motion pictures is one  
14 copy of the best edition of the work as first published  
15 abroad or as published. One copy of Form PA application,  
16 a separate written description of the work and a \$10 regis-  
17 tration fee.

18 Q In the processing of the application that became  
19 PA59-977 Galaxian, how did you handle that or how was that  
20 handled, if you recall? What actions did you take with  
21 respect to the application?

22 A I cannot recall specific details that were  
23 different from handling processing many other applications.

24 Q What then, is the normal process that you can't  
25 recall any differences from?

1 MR. PLAIA: I don't understand. Were you asking  
2 for--can I object, Your Honor. I don't think it's definite  
3 what he's asked for.

4 JUDGE MATHIAS: I think what he means is what  
5 steps do you usually take in processing. Why don't we just  
6 put it that way?

7 MR. PLAIA: Okay.

8 THE WITNESS: The normal process is to screen the  
9 copy and to take--

10 MR. PLAIA: My objection is that this is going  
11 outside the scope of what was said to him and what he said  
12 to Mr. Larson. That's what the allegations are.

13 JUDGE MATHIAS: At the same time it is factual.  
14 I don't know that it won't lead to something. I would take  
15 it that at this point it is exploratory. I will allow a  
16 limited exploration to see if it brings anything to light.

17 THE WITNESS: Examination of the copy to take down  
18 viewable credits, to check for copyrightable content.  
19 Examination of the application for copyright facts, screening  
20 the description to see if the description fits the work that  
21 is deposited for registration.

22 BY MR. KINNEY:

23 Q And, is that the normal procedure for--at that time,  
24 for a motion picture application?

25 A Yes sir.

1 Q Did you view or see the assignment document that  
2 was filed with the applications?

3 A I cannot recall that.

4 Q Would it be your normal practice to have seen the  
5 assignment documents?

6 A Normally, when claims go through normal channels,  
7 yes.

8 Q When a claim is made or is going through the  
9 special handling provisions, or when the request for special  
10 handling has been made, would you normally see the assign-  
11 ment document?

12 MR. PLAIA: Objection, Your Honor. He's going  
13 through other areas other than what they talked about. He  
14 was going to testify as to what Mr. Larson said to him and  
15 what he said to Mr. Larson.

16 JUDGE MATHIAS: Where are we going, Mr. Kinney?  
17 What is it you're trying to establish?

18 You're getting into what the regulations are con-  
19 cerning the assignment documents. I think we had the testi-  
20 mony of Mary Beth Peters as to that.

21 MR. KINNEY: Well, I would like to know what  
22 happened in this particular case. When these applications--  
23 he actually saw the assignment documents or not.

24 MR. PLAIA: He said he doesn't remember.

25 THE WITNESS: I do not remember.

1 MR. PLAIA: How do you expect him to say what the  
2 normal procedures are when he said he doesn't remember?

3 MR. BAILEY: Your Honor, if I may?

4 JUDGE MATHIAS: Yes, Mr. Bailey?

5 MR. BAILEY: Perhaps it would be a good idea to  
6 refresh Mr. Albee's recollection by showing him a copy of the  
7 assignment and ask him if he has ever seen it before.

8 JUDGE MATHIAS: Do we have a copy of this for  
9 Galaxian. The questions are related to the Galaxian game.  
10 Do we have a copy of the entire application with--  
11 I wonder here if you're not getting irrelevant.

12 The Galaxian application is not at issue here.  
13 The only way I'm allowing you to get into Galaxian at all  
14 is in connection with any representations that may have been  
15 made there that may have affected the later applications for  
16 PAC MAN and RALLY-X.

17 Now, if you want to ask him in connection with  
18 PAC MAN and RALLY-X is he has seen them, I think that may  
19 be relevant. I will strike the question as far as Galaxian  
20 is concerned. Those documents are all in evidence.

21 MR. KINNEY: May we have a five minute break, Your  
22 Honor.

23 JUDGE MATHIAS: Can you give us some idea of how  
24 much more questioning you have?

25 MR. KINNEY: Not more than one-half hour.

1 JUDGE MATHIAS: All right. We'll take a five  
2 minute break.

3 (Whereupon, a brief recess was taken.)

4 JUDGE MATHIAS: Back on the record.

5 BY MR. KINNEY:

6 Q Mr. Albee, I would like you to take a look at  
7 CRX-1 which purports to be a covering letter regarding  
8 Galaxian and ask you if you recognize that letter?

9 A Yes sir. I believe I do. This looks like the  
10 letter which was deposited with the Galaxian deposit as best  
11 as I recall.

12 Q I call your attention to 1(b) which says "video  
13 deposit (1 copy)" and ask you if you recall seeing that at  
14 the time of accepting--

15 MR. PLAIA: I'm going to object to this, Your  
16 Honor. He's going right into his thought processes when  
17 he received the deposit.

18 JUDGE MATHIAS: Well, I will allow this question  
19 if you remember seeing it.

20 THE WITNESS: I would say yes.

21 MR. KINNEY: Your Honor, can I ask him what that  
22 meant to him?

23 JUDGE MATHIAS: It's such a difficult area of the  
24 law.

25 MR. PLAIA: I think it's clearly a mental

1 impression. When he receives an application, what the subject  
2 matter inside the application means to him.

3 JUDGE MATHIAS: It's also a factual issue because  
4 what does in copyright office practice a copy mean?

5 MR. PLAIA: I don't think he's in a position to  
6 answer that type of question. It was not presented here and  
7 it was not represented that he would be going into that type  
8 of information. We were going to find out what Mr. Larson  
9 said to him and what he said to Mr. Larson. Fraud was the  
10 allegation, serious allegation.

11 JUDGE MATHIAS: Well, I'm not sure what the  
12 relevancy would be one way or the other. When you're dealing  
13 with the question of fraud, I don't know whether ascribing  
14 a technical meaning to this or taking it under the usual  
15 dictionary term. I don't think--I don't see that if one  
16 person means one thing and another reads it as another that  
17 this is evidence of fraud in any event.

18 MR. BAILEY: Your Honor, I have--I was out of the  
19 room at the moment. Can I see what Mr. Kinney is speaking  
20 of?

21 JUDGE MATHIAS: Would you show the letter to  
22 Mr. Bailey?

23 I am going to allow the question, but I still have  
24 serious doubts as to its relevancy and I think it is in a  
25 very gray area. I hope I am not treading on the law. You

1 may answer the question, Mr. Albee.

2 THE WITNESS: Normally, when we receive a covering  
3 letter, it does state how many copies of whatever work is  
4 being deposited--that is being deposited. If it is two  
5 books, they may say two copies. If it is one motion picture,  
6 then, they say one copy. It could be in the form of a video-  
7 tape or could be in the form of a film.

8 BY MR. KINNEY:

9 Q When the follow-up application was filed, PA68-323,  
10 did you take that to be a similar application to the Galaxian  
11 previous application?

12 MR. PLAIA: Objection.

13 JUDGE MATHIAS: Objection sustained.

14 MR. KINNEY: What was the grounds for the objection,  
15 Your Honor?

16 JUDGE MATHIAS: You're going into his mental  
17 processes, Mr. Kinney. You're not dealing with factual  
18 matters. In addition, we're not dealing with Galaxian here,  
19 I have stated earlier that I would only allow you to get into  
20 Galaxian to the extent that it dealt with representations  
21 made by Midway in connection with that application that might  
22 have carried over and had some effect upon the applications  
23 in the PAC MAN and RALLY-X, so that when you're getting into  
24 those representations, I wish you would get down to PAC MAN  
25 and RALLY-X at the very least.

1 MR. KINNEY: All right.

2 BY MR. KINNEY:

3 Q Would you consider this that there were any repre-  
4 sentations by Midway that carried over to the PAC MAN and  
5 RALLY-X applications?

6 MR. PLAIA: Objection. He's going into the center  
7 of his thought processes. Did he consider.

8 JUDGE MATHIAS: It also comes very close to some  
9 questions that have been allowed in previous cases. I will  
10 allow him to answer this question. In considering the appli-  
11 cations for the PAC MAN and RALLY-X game, did you consider  
12 any statements made to you by Mr. Larson in connection with the  
13 Galaxian application?

14 THE WITNESS: I would have to say yes sir. Although  
15 I have a problem with the word "statements".

16 JUDGE MATHIAS: What is your problem with the  
17 word "statements"?

18 THE WITNESS: Whether they were statements or  
19 understandings.

20 JUDGE MATHIAS: When you mean understandings, you  
21 mean your mental impressions?

22 THE WITNESS: Right.

23 BY MR. KINNEY:

24 Q Would it have been material for you in considering  
25 any of these applications to have known that the work alleged

1 to be covered by those applications was a videogame rather  
2 than a--what was submitted as a copy of the work?

3 MR. PLAIA: Objection.

4 JUDGE MATHIAS: I will sustain the objection.

5 Again, my basis is the law concerning the legitimate areas  
6 to question the copyright examiner in connection with an  
7 application.

8 BY MR. KINNEY:

9 Q Mr. Albee, what facts did you rely upon allowing  
10 the application that became PA59-977 Galaxian?

11 MR. PLAIA: Objection. That's asking him what his  
12 mental processes were when he was acting as an examiner. It  
13 is not asking him what the representations were.

14 MR. KINNEY: Your Honor--

15 JUDGE MATHIAS: I'm going to overrule the objection.  
16 The question has been allowed by a previous court.

17 THE WITNESS: Please restate the question, Mr.  
18 Kinney.

19 BY MR. KINNEY:

20 Q What facts did you rely in allowing Galaxian appli-  
21 cation that resulted in PA59-977?

22 MR. PLAIA: Well, I'm going to object to it on the  
23 basis of foundation. I mean, we're talking what he recalls?

24 JUDGE MATHIAS: Well, I'm going to make you qualify  
25 that statement. That is, if you recall all those facts.

1 THE WITNESS: It's very difficult for me to make  
2 a bold flat statement concerning a specific case like that  
3 when I deal with so many and considering the things involved,  
4 I don't think that I could legitimately go on-line and say  
5 specifically what facts were relied on in this instance.

6 BY MR. KINNEY:

7 Q Mr. Albee, I know you're concerned by having to  
8 testify here and no one likes to, I beleive, testify when  
9 there's--

10 MR. PLAIA: I would object to this whole line,  
11 Your Honor. I think we should be asking questions to  
12 get facts from this witness, like, we brought him here to  
13 get the facts, let's get them.

14 JUDGE MATHIAS: All right. I don't think any  
15 speeches are necessary, Mr. Kinney. I think Mr. Albee under-  
16 stands that there's a private controversy involved here and  
17 that you're representing your client the best your can.

18 BY MR. KINNEY:

19 Q Can you recall any one fact upon which you relied  
20 in passing the application that resulted in Galaxian PA59-977?

21 MR. PLAIA: Objection.

22 JUDGE MATHIAS: I'm going to sustain that objection.  
23 I believe if he can recall--I will allow you to ask him if  
24 he can recall any one controlling fact.

25 MR. KINNEY: All right.

1 JUDGE MATHIAS: I know this is a--and this is  
2 strictly if he can recall.

3 THE WITNESS: Any one controlling--

4 JUDGE MATHIAS: Controlling fact.

5 THE WITNESS: Which lead me to---

6 JUDGE MATHIAS: Which lead you to approve the  
7 registration.

8 MR. PLAIA: I want to voice my objection to that  
9 question, Your Honor.

10 JUDGE MATHIAS: I'm overruling your objection,  
11 Mr. Plaia. This is a question that has been allowed in a  
12 previous court.

13 THE WITNESS: That--I guess it would have to be  
14 that the copy deposited represented a complete work submitted  
15 for copyright registration.

16 BY MR. KINNEY:

17 Q Thank you. Is there any one controlling factor  
18 you can recall that would allow--that lead you to allow the  
19 application that resulted in PA83-768 PAC MAN?

20 MR. PLAIA: I'll object to that.

21 JUDGE MATHIAS: I'll allow the question.

22 THE WITNESS: I do not remember the details con-  
23 cerning registration of that claim, sir.

24 BY MR. KINNEY:

25 Q Mr. Albee, I would like you to examine RX-21 and

1 RX-23.

2 MR. PLAIA: Can you tell us what those are?

3 MR. KINNEY: Which are a receipt from the Copyright  
4 Office regarding the RAC MAN game application and a copy of  
5 the cover letter that apparently was sent with the application.

6 BY MR. KINNEY:

7 Q Do you recall seeing these documents before?

8 A Mr. Kinney, I can say that I very likely saw them.  
9 I cannot guarantee and state specifically that I have seen  
10 these documents before. I have seen hundreds of these.

11 Q Can you recall having any meeting regarding this  
12 particular application with other members of the staff of the  
13 Copyright Office or anyone else?

14 A I do not specifically remember with regard to this  
15 work.

16 Q You stated earlier that the fact that the video-  
17 cassette submitted with Galaxian was a controlling factor in  
18 your allowance in the application that resulted in PA59-977.  
19 Would that have also been a controlling fact--strike that.  
20 I believe you stated that the fact that the videocassette  
21 was submitted as a copy of the work was a controlling factor  
22 or fact in your allowing the application that resulted in  
23 PA59-977 Galaxian, would it have also have been a controlling  
24 fact in your allowance of PA83-768 PAC MAN?

25 MR. PLAIA: Objection. Your Honor, there is just

1 no foundation. He said he can't remember working on that  
2 application. And, I think it mischaracterizes his testimony.

3 JUDGE MATHIAS: Did Mr. Kinney accurately charac-  
4 terize your earlier testimony?

5 THE WITNESS: I believe he did.

6 JUDGE MATHIAS: I will allow him to answer the  
7 question.

8 THE WITNESS: So that I can get this right, would  
9 you please rephrase it?

10 BY MR. KINNEY:

11 Q Sure.

12 JUDGE MATHIAS: Do you want it re-read or rephrased?

13 THE WITNESS: Just repeat it.

14 MR. KINNEY: Perhaps the court reporter could  
15 repeat it.

16 JUDGE MATHIAS: Please re-play that portion of the  
17 tape, Mr. Reporter.

18 (The reporter read back the pending question.)

19 THE WITNESS: Yes, it would have been, sir.

20 BY MR. KINNEY:

21 Q Would the fact that the videotape submitted with  
22 the application that resulted in PA88-049 RALLY-X was sub-  
23 mitted as a copy of the work have also been a controlling  
24 factor in your allowing that application?

25 MR. PLAIA: Objection.

1 JUDGE MATHIAS: I'll note your continuing objection.  
2 I'll overrule it.

3 MR. PLAIA: He --

4 JUDGE MATHIAS: I believe you're asking him to  
5 answer the same question.

6 BY MR. KINNEY:

7 Q Yes, can you answer the same question with respect  
8 to Galaxian? I'm sorry, with RALLY-X.

9 MR. BYRNES: Your Honor, may I object?

10 JUDGE MATHIAS: Mr. Byrnes?

11 MR. BYRNES: I would object to that question on  
12 the basis that Mr. Albee did not examine RALLY-X.

13 JUDGE MATHIAS: All right. Objection is sustained.

14 MR. KINNEY: That would be certainly a very good  
15 objection.

16 JUDGE MATHIAS: It is a good one.

17 BY MR. KINNEY:

18 Q Did you examine RALLY-X?

19 A I do not recall.

20 JUDGE MATHIAS: I believe it was stated by Ms.  
21 Peters when she was on the stand that there was a Mr.  
22 Weinstein that had examined the RALLY-X game and so--

23 MR. KINNEY: Your Honor, I believe she stated that  
24 the record indicated Mr. Weinstein did, but may I go into  
25 this a little bit further just to make sure? To have the

1 witness--

2 JUDGE MATHIAS: Indication that she's wrong?

3 MR. KINNEY: Yes. RX-20 states, attention of  
4 Dave Albee and it relates to RALLY-X.

5 JUDGE MATHIAS: You may show him RX-20 and see if  
6 that refreshes his memory.

7 BY MR. KINNEY:

8 Q Mr. Albee, I would like you to look at RX-20--  
9 I believe it's 22 and see if you can recall those papers.

10 A Once again, I cannot specifically state that I have  
11 seen them. I should note that because receipts indicate that  
12 material is to be directed to an individual, does not neces-  
13 sarily mean that it goes to that individual.

14 JUDGE MATHIAS: Do you have any recollection, Mr.  
15 Albee, of ever having approved the application for RALLY-X?

16 THE WITNESS: I do not sir. I can't specifically  
17 state that.

18 JUDGE MATHIAS: We have the direct testimony  
19 previously which is uncontradicted to the effect that Mr.  
20 Albee did not handle that particular application, so, I'll  
21 sustain the objection.

22 MR. BYRNES: Your Honor, could I clarify the record  
23 on the point about RALLY-X?

24 JUDGE MATHIAS: Well, I don't know that it's neces-  
25 sary. Let me hear off the record what it is.

(Discussion held off the record)

JUDGE MATHIAS: It has been noted by Mr. Byrnes and I will note it for the record that the application for RALLY-X does not contain Mr. Albee's initials. And, this would be a further indication that he did not handle that application.

BY MR. KINNEY:

Q And, you have no recollection of the RALLY-X application at all, then?

A No sir. I do not.

Q Okay. Do you recall discussing with Mr. Larson the deposit requirements of the Copyright Office with respect to microchips?

A No sir. I never did.

Q Do you recall discussing with Mr. Larson or making the suggestion that the videotape be published?

A Would you please restate the question.

Q Do you recall in any discussion with Mr. Larson making a suggestion as to the publication of a videotape?

A I'm not sure what your question is. I'm sorry.

Q Did Mr. Larson ever tell you he had a videotape that had been distributed to the public and did you ever ask or suggest that copies be distributed prior to going to the Copyright Office?

JUDGE MATHIAS: That's a two-part question. Did he ever make such a statement to you and did you ever make

1 such a statement to him? Take them one at a time.

2 THE WITNESS: Did he ever ask me if--please rephrase  
3 the question.

4 BY MR. KINNEY:

5 Q Well, can you recall anything regarding such a  
6 conversation?

7 A Concerning publication?

8 Q Yes, publication of a videotape.

9 A We may have discussed publication within the defini-  
10 tion of the law. I do not clearly recall an ongoing discussion  
11 of publication with Mr. Larson other than in our general  
12 conversation, possibly.

13 Q Would you regard the fact of distribution of a tape  
14 or copies of a videotape to members of the public or the lack  
15 of such distribution as a material fact in considering an  
16 application for registration of a copyright?

17 MR. PLAIA: Objection.

18 JUDGE MATHIAS: I'm going to sustain the objection.

19 MR. KINNEY: Your Honor, questions of lack of  
20 disclosure of a fact are difficult to inquire into and I  
21 believe I should be able to establish whether or not the lack  
22 of disclosing of a certain fact was material as well as the  
23 disclosure of other facts which--

24 JUDGE MATHIAS: The law is going to establish  
25 whether the disclosure or non-disclosure is something that's

1 material. His belief is a matter of probing his mental  
2 processes. Your question was defective the moment you stated  
3 "do you believe" or "do you"--I forget the exact wording, but  
4 it was something to that effect. "Do you consider"--then,  
5 we're getting into mental processes and then, I sustained  
6 the objection.

7 BY MR. KINNEY:

8 Q Mr. Albee, were you informed by Mr. Larson that the  
9 machine depicted in the videotapes submitted with the appli-  
10 cation that eventually became PA59-977 Galaxian was not the  
11 machine first published in Japan?

12 A The machine?

13 Q The machine portrayed in the tape.

14 A It sounds as if--at least, what I'm hearing is was  
15 the machine published. We're talking about the videotape  
16 copy. My discussions with Mr. Larson concerned the videotape  
17 copy.

18 Q Were you informed that that videotape was recorded  
19 in the United States?

20 A No sir. I don't believe the question came up.

21 Q Were you informed that that videotape was made  
22 especially for filing in the United States Copyright Office?

23 A Not that I recall, sir.

24 Q With respect to any of the Galaxian PA59-977, the  
25 PA83-768 PAC MAN and the PA88-049 RALLY-X applications--

1 JUDGE MATHIAS: Not the RALLY-X--he didn't--

2 MR. KINNEY: I'm sorry. You're right, Your Honor.

3 JUDGE MATHIAS: Limit it to the Galaxian and

4 PAC MAN.

5 BY MR. KINNEY:

6 Q With regard to the Galaxian and PAC MAN applications,  
7 were you informed in either case that the videotape was made  
8 especially for filing in the United States Copyright Office?

9 A No sir.

10 Q Were you informed in either case that it was  
11 recorded in the United States?

12 A No sir. I don't believe so.

13 Q In view of the statements on the application form  
14 had you been so informed, would you have passed either one  
15 of those applications for allowance?

16 MR. PLAIA: Objection.

17 JUDGE MATHIAS: Objection is sustained.

18 (Continued on next page)

19

20

21

22

23

24

25

End T-10

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BY MR. KINNEY: "....."

Q Were you informed in any of the cases that the videotape images submitted on the videotape were not recorded until well after the day alleged to be the date of first publication?

MR. PLAIA: I'm going to object, because he's saying any of the applications.

JUDGE MATHIAS: Well, that question may be qualified --

MR. KINNEY: Galaxian --

JUDGE MATHIAS: Galaxian or PacMan applications.

THE WITNESS: No such.

MR. BAILEY: Repeat the question, please.

MR. KINNEY: Let me ask it again.

BY MR. KINNEY:

Q With respect to the Galaxian or PacMan copyright applications that you handled, were you informed that the videotaped images submitted on the tape that was submitted with those applications, were not recorded until well after the date alleged to have been the date of first publication in the respective application?

MR. PLAIA: Objection, as to foundation.

JUDGE MATHIAS: Objection overruled. It's already been answered.

THE WITNESS: My answer stands. No.

1 MR. KINNEY: No you were not. Okay.

2 That concludes my examination of this witness.

3 JUDGE MATHIAS: Mr. Plaia, are you prepared to  
4 begin with your cross?

5 MR. PLAIA: Yes, I have cross.

6 CROSS EXAMINATION

7 BY MR. PLAIA:

8 Q Mr. Albee, in response to Mr. Kinney, concerning  
9 the PacMan registration, you initially indicated that you  
10 really didn't recall the facts and circumstances around  
11 that specific registration. And when he was asking you  
12 the series of questions which followed concerning whether  
13 you were informed of something or not informed of something,  
14 were your answers responsive that you were unable to recall  
15 the circumstances and the facts surrounding that application?

16 A My answers were geared to, in neither case was  
17 that specific question asked to me that I could recall.

18 Q That you could recall?

19 A That's right.

20 Q Can you describe what Mr. Larson looks like?

21 A Roughly. He's over six feet tall and has sort  
22 of sandy blonde hair, and I think he parts it in the middle.

23 Q Did you see im here today?

24 A Yes, sir.

25 Q Do you remember having more than that one meeting

1 on March 6, 1980, with Mr. Larson, concerning the Galaxian  
2 application?

3 A I do not recall other specific meetings concerning  
4 Galaxian. I had subsequent meetings with Mr. Larson  
5 concerning a variety of copyright registrations, not all  
6 of which dealt with this.

7 Q Is it your testimony that on the day that you  
8 met with Mr. Dietz and Mr. Larson that you received an appli-  
9 cation for the Galaxian registration?

10 A This was a question Mr. Kinney asked, and I am  
11 not sure. He asked if I received the application and a  
12 synopsis and things. I'm not sure that I received it on  
13 the day of the meeting. It may have been the next day.

14 Q Could it have been a week later?

15 A I could not testify to that, Mr. Plaia, I'm sorry.  
16 I do not know within the time frame, what the time frame  
17 was.

18 Q Well, did you see him -- if it was later do you  
19 remember seeing him twice with this application registration?

20 A That's very hard to say. I really -- I don't  
21 want to say that I did see him twice or that I saw him  
22 three times with regard to this one application. I really  
23 do not recall the specifics regarding that.

24 Q You do recall this happening in Mr. Dietz' office?

25 A To the best of my ability, the -- I do remember

1 that's where we initially met. I do remember that Mr.  
2 Dietz left. Whether we continued our conversation in Mr.  
3 Dietz' office itself or whether we went to the public infor-  
4 mation office, I'm not sure, but I believe we stayed in  
5 Mr. Dietz' office and concluded what conversations we  
6 had.

7 Q How much of the conversation was Mr. Dietz there  
8 for?

9 A As I testified earlier, essentially introductory  
10 comments and basic statements of what he and Mr. Larson  
11 had spoken about just in very, very general terms.

12 Q Can you recall what Mr. Dietz told you when you  
13 entered the meeting?

14 A Not specifically.

15 Q Can you generally tell me what the discussions  
16 that Mr. Dietz was telling you about involved?

17 A No, sir, because they were very general.

18 Q Would they have been involved with a videogame?

19 A It did involve discussions of what could or could  
20 not be registered and the fact that he and Mr. Larson had  
21 been having a discussion. But --

22 Q Well, then, is it your answer that the discussions  
23 that transpired had to do with videogames?

24 A The discussions that transpired had to do with  
25 the deposit that Mr. Larson was bringing in. I was not

1 present for the discussions between Mr. Larson and Mr.  
2 Dietz and I can't testify to the content of those discussions.

3 Q Is it your testimony that you don't know whether  
4 the discussion had to do with videogames or not?

5 A I would have to say I believe it did but I do  
6 not know the details of that.

7 Q Did you -- do you recall discussing the Intel?

8 A I did not discuss Intel. I don't know anything  
9 about it, except the name.

10 Q Are you an attorney?

11 A No, I am not.

12 Q Do you recall having handled the Galaxian  
13 Attract Mode deposit?

14 A As I recall, my initials are on that application.  
15 I don't recall specifically which one I handled when, or  
16 specific details about -- let's rephrase that. I'm not  
17 sure about specific detail sorting between the two games,  
18 the registration of the claims in the two games.

19 Q You mean between the Galaxian -- Galaxian Attract  
20 Mode.

21 A Right.

22 Q Would it refresh your memory if I told you that  
23 the Attract Mode was on a permanent recurring always the  
24 same --

25 A I know what an Attract Mode is.

1 Q -- that draws, that would draw the player?

2 A I know what an Attract Mode is. It's similar  
3 to the one that's running over here.

4 Q Do you recall that registration?

5 A That's hard to say. I initialled it. I can't  
6 speak to any specifics concerning that registration.

7 Q Do you know whether that was before -- the Attract  
8 Mode was before or after the --

9 A The Galaxian --

10 Q -- the Galaxian?

11 A That would appear on the dates. It would appear  
12 on the applications.

13 Q Do you recall meeting with Mr. Larson concerning  
14 the Galaxian Attract Mode application?

15 A I'm not sure. I'm not sure.

16 Q Do you have an independent recollection of the  
17 PacMan application, without looking at it; do you have  
18 an independent recollection --

19 A No, I do not, sir.

20 Q Is the reason why you think you handled PacMan  
21 because your initials were on it?

22 A Yes.

23 MR. PLAIA: Your Honor, one second, please.  
24 (Pause)

25 MR. PLAIA: That concludes my cross, Your Honor.

1 JUDGE MATHIAS: Mr. Bailey?

2 CROSS EXAMINATION

3 BY MR. BAILEY:

4 Q Mr. Albee, was it stated to you in a written  
5 or oral form that the first publication of the PacMan  
6 game was in Japan?

7 MR. PLAIA: I'm sorry, I'm going to have to object.  
8 There's no foundation. He just testified he doesn't have  
9 any recollections about that.

10 JUDGE MATHIAS: If you recall, Mr. Albee.

11 THE WITNESS: I do not. I do not recall, other  
12 than the facts that were stated on the application itself.

13 BY MR. BAILEY:

14 Q Do you look at the applications, I mean, when  
15 you --

16 A Oh, yes, sir.

17 Q Was it stated to you that there existed a license  
18 agreement between NAMCO and Rally, NAMCO and Midway, with  
19 respect to PacMan?

20 MR. PLAIA: Objection again, on the same basis.

21 JUDGE MATHIAS: If you have any recollection,  
22 Mr. Albee.

23 THE WITNESS: I have no recollection of specific  
24 statements, once again. If there was a statement on the  
25 application, I may have seen them.

Acme Reporting Company

(202) 628-4888

1 BY MR. BAILEY:

2 Q With respect to Rally-X, was it stated to you  
3 that the first publication was in Japan?

4 MR. PLAIA: I'm going to object again --

5 THE WITNESS: I didn't examine Rally-X I believe.

6 MR. BAILEY: I'm sorry. Okay.

7 BY MR. BAILEY:

8 Q Was there a request made to you for special relief  
9 by Mr. Larson with respect to PacMan?

10 A No, sir.

11 MR. PLAIA: Objection. He says he can't remember --  
12 recall, I don't know how --

13 MR. BAILEY: He didn't say he couldn't recall  
14 that.

15 JUDGE MATHIAS: What is the question then, then?

16 MR. BAILEY: I asked if he -- if there was a  
17 statement made to him either in written form or verbally  
18 for special relief with respect to PacMan by Mr. Larson.

19 JUDGE MATHIAS: You may answer if you recall.

20 THE WITNESS: I believe I stated earlier that  
21 there were no requests for special relief asked of me with  
22 regard to the works that I recalled dealing with with Mr.  
23 Larson directly.

24 BY MR. BAILEY:

25 Q Mr. Albee, I'd like to show you Exhibit 117 --

Acme Reporting Company

1 JUDGE MATHIAS: CX-117?

2 MR. BAILEY: CX-117.

3 (Pause)

4 MR. BAILEY: Which has been admitted into evidence  
5 as a registration certificate for PacMan.

6 BY MR. BAILEY:

7 Q Do you recall seeing this application?

8 A My initials are on the application --

9 Q Where are your initials? Can you state for the  
10 record?

11 A On the top, where it says "Examined By."

12 Q Do you see where it says "date and nation of first  
13 publicatoin"?

14 A Yes, sir.

15 Q Okay. Was there any statement by you as to the  
16 fact that the first publication of PacMan was in Japan --  
17 any statements relating to that fact by you to Mr. Larson?

18 A I do not remember, Mr. Bailey. I don't remember --

19 Q Were there any statements by Mr. Larson to you  
20 about it?

21 A Likewise, I don't remember.

22 MR. PLAIA: He said twice -- I believe, did you  
23 say you don't remember twice?

24 JUDGE MATHIAS: Yes, he did. I think the reporter  
25 got it or he would have --

1 MR. BAILEY: Yes, I think it's been established  
2 on the record.

3 JUDGE MATHIAS: I think Mr. Plaia's concern was  
4 whether or not the Reporter got that answer.

5 MR. PLAIA: Yes, Your Honor.

6 (Pause)

7 MR. BAILEY: I have no further questions, Your  
8 Honor.

9 JUDGE MATHIAS: Mr. Kinney?

10 MR. KINNEY: I have three on redirect.

11 REDIRECT EXAMINATION

12 BY MR. KINNEY:

13 Q Mr. Larson, if you had been told with regard  
14 to the Galaxian or PacMan applications that the video cassette  
15 videotaped cassette that was deposited with the work was made  
16 in the U.S. A., would you have recalled that fact of being  
17 told that?

18 MR. PLAIA: Objection. I think he's testified  
19 as to what he recalled. It's --

20 JUDGE MATHIAS: I'll overrule the objection.

21 THE WITNESS: Please rephrase your question.

22 BY MR. KINNEY:

23 Q If you had been told that the videotape submitted  
24 with either the Galaxian or PacMan applications was recorded  
25 in the United States, would you have recalled that fact?

Acme Reporting Company

1 Would you have recalled being told that fact?

2 MR. PLAIA: I've objected to this, Your Honor.

3 JUDGE MATHIAS: I know. I overruled your objection.

4 THE WITNESS: I probably would have recalled  
5 it, because we would have corresponded or we would have  
6 requested clarification of the statement of publication  
7 at Space 3 of the application, which cited Japan.

8 BY MR. KINNEY:

9 Q If you had been told that that videotape was  
10 recorded after the date of alleged first publication, would  
11 you have recalled being told that?

12 A The answer is the same; that we would have corres-  
13 ponded concerning that matter.

14 Q And likewise, if you had been told that the videotape  
15 was made especially for filing in the Copyright Office,  
16 would you have remembered being told that fact?

17 A Very definitely.

18 MR. PLAIA: I'm going to object to that question,  
19 too, Your Honor.

20 JUDGE MATHIAS: It's a little late. I would have  
21 overruled the objection.

22 BY MR. KINNEY:

23 Q And had you been told that the videotape submitted  
24 to the Copyright Office had not been publicly distributed,  
25 would you have remembered being told that?

1

MR. PLAIA: Objection.

2

JUDGE MATHIAS: Overruled.

3

4

THE WITNESS: If it had -- if I had been told that it was not publicly distributed, I would have questioned the publication statement on the application.

5

6

MR. KINNEY: That concludes my redirect.

7

8

JUDGE MATHIAS: I would ask one question. I wasn't sure from your testimony. I believe you stated earlier that you did view the tape at some time.

9

10

THE WITNESS: Yes, sir.

11

12

JUDGE MATHIAS: It was in connection with both the Galaxian and the PacMan?

13

14

THE WITNESS: In each case where we examine a claim, we do view the tape, and I would have viewed it, yes, sir.

15

16

17

JUDGE MATHIAS: All right. Any further questions?

18

(Pause)

19

20

21

22

23

24

25

End 11A

1 MR. PLAIA: One more question, Your Honor.

2 FURTHER RECROSS EXAMINATION

3 BY MR. PLAIA:

4 Q Mr. Albee, this is in regards to Galaxian. Not  
5 the attract mode, but Galaxian. I think you testified that  
6 you have viewed the tape?

7 A Yes sir.

8 Q Do you have any recollection of viewing the tape?

9 A Mr. Plaia, I view hundreds of tapes a week. I do  
10 not recall any specific details about the tape.

11 Q I guess the follow-up reason why you believe  
12 that you viewed the Galaxian tape is because your initials  
13 are on the application?

14 A It's a matter of course. Yes sir.

15 JUDGE MATHIAS: Any further questions?

16 MR. KINNEY: No, Your Honor.

17 MR. BAILEY: No questions.

18 JUDGE MATHIAS: Thank you very much, Mr. Albee.  
19 You are excused.

20 (The witness was excused)

21 JUDGE MATHIAS: All right. What other witnesses  
22 now do you have planned, Mr. Kinney for this evening?

23 MR. KINNEY: I am going to resume Mr. Huang's testi-  
24 mony and that's it.

25 JUDGE MATHIAS: All right. Can you give us some

1 idea of how much longer you expect to have Mr. Huang on direct?

2 MR. PLAIA: Your Honor, we have Mr. Dietz waiting  
3 from the Copyright Office.

4 JUDGE MATHIAS: Well, that's a rebuttal witness.

5 MR. PLAIA: He's here.

6 JUDGE MATHIAS: I know he's here. He's here as a  
7 rebuttal witness. I want to accommodate Mr. Dietz, but I  
8 have to accommodate Mr. Kinney too. If you can get together  
9 with Mr. Kinney and reach some agreement, I will abide by  
10 whatever agreement is reached, but I won't interrupt Mr.  
11 Kinney's case for a rebuttal witness at this point. I'm  
12 sorry, I would like to accommodate Mr. Dietz, but I also want  
13 to get this case finished.

14 If an accommodation could be reached--I'll put it  
15 this way, Mr. Kinney, I would very much appreciate it since  
16 Mr. Dietz is not an interested party and is being put to a  
17 great deal of inconvenience--

18 MR. PLAIA: His testimony will be brief. You know  
19 from the facts so far that he was involved in a small segment,  
20 and Mr. Huang, I understand, will be quite long.

21 JUDGE MATHIAS: Well, when did you propose to put  
22 him on, immediately, right now?

23 MR. PLAIA: Yes, he's waiting.

24 JUDGE MATHIAS: Mr. Kinney, do you have any  
25 objection?

1 MR. BAILEY: I have no objection.

2 JUDGE MATHIAS: All right. Then, we'll accommodate  
3 Mr. Dietz and put him on now out of turn. Would everyone  
4 like a few minutes break before we do?

5 MR. BAILEY: Yes, that sounds like a good idea.

6 JUDGE MATHIAS: Well, we'll take a few minutes  
7 break.

8 (Whereupon, a brief recess was taken)

9 JUDGE MATHIAS: Can we come to order please?  
10 I believe that just before the break it had been decided that  
11 we would go out of order and take one of Mr. Plaia's witnesses  
12 a Mr. Dietz. Would you please call your witness, Mr. Plaia?

13 MR. PLAIA: Mr. Bernard Dietz?

14 JUDGE MATHIAS: Mr. Dietz, would you step forward  
15 please and take the stand?

16 Whereupon,

17 BERNARD C. DIETZ  
18 having been first duly sworn, was called as a witness herein,  
19 and was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. PLAIA:

22 Q Please state your name?

23 A My name is Bernard C. Dietz.

24 Q And, what is your address, Mr. Dietz?

25 A 205 Yardley Court, Alexandria, Virginia.

1 Q And, are you employed?

2 A Yes I am.

3 Q Where are you employed?

4 A I am employed at the Library of Congress.

5 Q And, what is your position there?

6 A I'm a supervisory copyright examiner in the  
7 Examining Division of the U.S. Copyright Office.

8 Q Are you an attorney-at-law?

9 A Yes I am.

10 Q I'm going to ask you to go back to February 26 or  
11 the end of February 1980 and ask you if you can recall having  
12 a meeting which was attended by Mr. Craig Larson and also  
13 Mr. Albee from the Copyright Office?

14 A Yes I do.

15 Q Do you recall where that meeting occurred?

16 A It occurred in my office in Crystal City, Arlington,  
17 Virginia.

18 Q And, do you recall who was at the meeting?

19 A I was present, Mr. Albee was present, Mr. Larson  
20 was present and for a portion of the meeting, another attorney  
21 employed at the Copyright Office, Mr. Allgeyer was present.

22 Q Mr. Allgeyer?

23 A Yes.

24 Q Can you tell me how long the meeting lasted?

25 A I have no recollection of the length at all. My

1 best recollection is that it took approximately one-half hour.

2 Q How did the meeting come about?

3 A At that time, my position was head of the Visual  
4 Arts Section of the Examining Division and one of the cate-  
5 gories of copyrightable subject matter with which we dealt  
6 were technical drawings. To the best of my recollection,  
7 Mr. Larson had appeared in the Public Information Office  
8 of the Copyright Office with an inquiry as to whether or  
9 not he could register a claim to copyright in the design for  
10 a computer chip, a semiconductor chip.

11 Inquiries of this type were normally referred to  
12 me and I received a call from the Public Information Office  
13 as to whether or not I could answer any questions that came  
14 up.

15 Mr. Larson came up to my office and we had a  
16 general discussion concerning copyright registration.

17 Q And, did you discuss the computer chip in regard  
18 to a videogame?

19 A We--the basis of our discussion was the type of  
20 authorship that may or may not have been embodied in that  
21 chip to which you could file a copyright registration appli-  
22 cation. The fact that the computer chip was in some way  
23 used in connection with a videogame was a part of the  
24 discussion only after some time on.

25 Q How did the videogame become a part of the

1 discussion?

2 A At the time of our meeting, it was not the policy  
3 of the Copyright Office to register claims to copyright in  
4 the designs for the topography of a semiconductor chip. It  
5 was at that time and I believe it still is the position of  
6 the Visual Arts Section that these are utilitarian articles  
7 which are not eligible for copyright registration as such.

8 Mr. Larson then mentioned that the chip was used  
9 in a videogame and that it actually displayed original  
10 graphic material. The example, I believe it was involved  
11 in the Galaxian game or something like that which involved  
12 spaceships and little monsters from outerspace which were  
13 very distinctively configured.

14 And, our discussion evolved along the line as to  
15 whether or not there was some way a copyright registration  
16 could be made to cover these graphics.

17 Q Did you discuss the Intel Decision with him?

18 A We discussed the Intel Decision in the context  
19 that we would not register a claim to copyright in the  
20 topography of the semiconductive chip.

21 Q Did he have a deposit with him and an application  
22 all ready to file when you had this meeting?

23 A I tried very very hard to recall that and for the  
24 life of me, I cannot. I simply cannot remember whether I  
25 actually handled a chip or a drawing of one. I do know that

1 I did not at that time see a copy of the graphics that I  
2 recall. I do not recall seeing at that time an application.  
3 It was my recollection that his inquiry at that point was  
4 an exploratory one, rather than an attempt to make a formal  
5 filing at that time.

6 Q Were your discussions with him--could they be  
7 characterized as hypotheticals?

8 A Not really hypotheticals, because we were talking  
9 about specific registration practices in Visual Arts Section  
10 and the specific practice we were discussing is the inability  
11 of the Copyright Office to register claims to copyright  
12 in the topography of the semiconductor chip. The question  
13 was very specific, it wasn't hypothetical.

14 Q Do you remember Mr. Larson having a tape with him?

15 A No I don't.

16 Q Were you called into the meeting by Mr. Albee or  
17 did you call him in?

18 A I called Mr. Albee's supervisor and with the  
19 suggestion that someone who worked in the section that deals  
20 with audiovisual works and motion pictures be present to  
21 discuss certain deposit registration practices for works of  
22 that type.

23 Q And, who came?

24 A Mr. Albee.

25 Q And, did you remain in the meeting with both of

1 them?

2 A Only to a very short point in time after that, after  
3 which Mr. Albee and Mr. Larson left my office to discuss  
4 other matters on their own.

5 Q Do you know where they went?

6 A No I don't.

7 Q Okay, you have related that the game had monsters  
8 and it was a space game and spaceships--can you reach back  
9 in your memory and tell me how you became aware of that  
10 during the meeting?

11 A I recognized the name of the videogame when it  
12 was mentioned. At some point in our discussion, it was  
13 mentioned that this chip was used in a videogame.

14 Q Had you seen the Galaxian game?

15 A I played them many, many times with no success  
16 at all.

17 Q Were there any discussions about videotapes during  
18 the meeting?

19 A We discussed--the word "videotape" came up, yes.  
20 We discussed the possibility of making a copy of certain  
21 material by using videotape as a medium.

22 Q Was that discussion geared towards figuring what  
23 a deposit could be with the application--with the eventual  
24 application?

25 A Yes.

1 Q And, was that expressed to you by Mr. Larson as  
2 being an application for a videogame?

3 A No.

4 Q How was it expressed to you?

5 A The basic problem we were discussing was whether  
6 or not those animated graphics could be captured in such a  
7 manner that we would have a copy that would serve as a basis  
8 for some type of registration in the Copyright Office.

9 Q Now, did you during your theoretical conversation  
10 mention coreography?

11 A I don't recall.

12 Q Do you remember making an analogy between a  
13 videogame and a motion picture of a coreography?

14 A No I don't.

15 MR. PLAIA: That concludes my questioning, Your  
16 Honor.

17 JUDGE MATHIAS: Mr. Kinney?

18 MR. KINNEY: One question.

19 CROSS EXAMINATION

20 BY MR. KINNEY:

21 Q When you were discussing with Mr. Larson the  
22 videotape, was Mr. Albee present at that time, if you can  
23 recall?

24 A It was at that time that I called Mr. Albee's  
25 supervisor so that if we discussed any type of deposit or

1 registration of deposit procedure that would involve a  
2 videotape that someone who dealt with this deposit and  
3 registration was present. Mr. Albee worked in the Performing  
4 Arts Section that normally examines videocopies. It was for  
5 that reason that I asked that someone be present.

6 MR. KINNEY: That's all, Your Honor.

7 JUDGE MATHIAS: Mr. Bailey, do you have any  
8 questions?

9 CROSS EXAMINATION

10 BY MR. BAILEY:

11 Q Mr. Dietz, I just want to be clear on something.  
12 Mr. Larson had initial contact with the Copyright Office  
13 before the Galaxian was with you?

14 A My recollection is that his initial contact was  
15 with one of our public information officers who then  
16 referred him to me.

17 Q I see. And, then, subsequently, you called Mr.  
18 Albee's supervisor after you obtained what the nature of  
19 his deposit would be?

20 A Well, we hadn't established what the nature of  
21 the deposit had been. What we were doing is we were ranging  
22 from a very specific discussion as to the registrability of  
23 a semiconductor chip to some alternative or other means of  
24 making a registration and at that point it was more or less  
25 a brain storming type discussion where a number of

1 possibilities were raised and shot down and so forth.

2 Q I see. So, is it your testimony that Mr. Larson  
3 stated to you that he intended to register the computer chips?

4 A My recollection is that the initial attempt was  
5 to register a claim to copyright in the actual topography  
6 of the chip.

7 Q I see.

8 A That would have been the preference of the  
9 applicant at that time. But, I don't recall there being  
10 a formal application prepared at that time ready for filing.  
11 It was more in the nature of an inquiry, of could this be  
12 done. And, the answer was no.

13 Q I see.

14 MR. BAILEY: I have no further questions, Your  
15 Honor.

16 JUDGE MATHIAS: Mr. Plaia?

17 MR. PLAIA: I just have one further question, Your  
18 Honor.

19 REDIRECT EXAMINATION

20 BY MR. PLAIA:

21 Q Now, you mentioned that somebody from the General  
22 Counsel's Office was at the meeting also?

23 A No. Mr. Allgeyer is an attorney-advisor attached  
24 to the Visual Arts Section. The examining division has  
25 examining sections within it and each examining section has

1 its own attorney advisor working within the section. The  
2 function is different than that of our General Counsel's  
3 staff.

4 Q What was his contribution to the meeting?

5 A He was there primarily as an observer because he  
6 was interested in this field.

7 MR. PLAIA: I have no further questions.

8 JUDGE MATHIAS: Thank you very much, Mr. Dietz.

9 You are excused.

10 THE WITNESS: Thank you.

11 (The witness was excused)

12 JUDGE MATHIAS: We are adjourning now for an hour.

13 We will adjourn until 6:30 p.m., at which time Mr. Kinney  
14 will put on Mr. Huang.

15 (Whereupon, at 5:26 p.m., the hearing was recessed  
16 to reconvene at 6:30 p.m., this same day, September 25, 1981)

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

DOCKET NUMBER: 337-TA-105

CASE TITLE: Certain Coin Operated Audio Visual Games  
and Components Thereof: Namely-Rally-X and Pac Man

HEARING DATE: September 25, 1981

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence  
herein are contained fully and accurately on the tapes and  
notes reported by me at the hearing in the above case before  
International Trade Commission  
and that this is a true and correct transcript of the same.

Date: September 25, 1981

*Jon Y. Hender*  
\_\_\_\_\_  
Official Reporter  
Acme Reporting Company, Inc.  
1411 K Street N.W.  
Washington, D.C. 20005